



86-694

No.

Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL KOLENTUS, et al.,  
Petitioners,

vs.

AVCO CORPORATION and AVCO  
PRECISION PRODUCTS DIVISION,  
AVCO CORPORATION, and  
CHEMICAL BANK,  
Respondents.

On Writ of Certiorari To The United  
States Court of Appeals for the  
Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the petitioners are entitled to receive the pension benefits represented to them by Avco for which they negotiated and which are set forth in their pension plans. This issue also includes the following sub-issues:

- (A) Petitioners' pension benefits vested upon their retirement (and upon the petitioners' otherwise qualifying for such).
- (B) In this case, good reasons exist to hold Avco responsible upon grounds of estoppel and promissory estoppel and also by the effect of plan summary booklets issued by Avco (setting forth the benefits petitioners were to receive).
- (C) The effect of the Welfare and Pension Plans Disclosure Act,



the plan summary booklet and Avco's failure to comply therewith.

(D) Unjust enrichment to Avco in the petitioners' accepting pension benefits in lieu of wages.

(E) Any provision permitting Avco to terminate the plans without adequate funding for accrued vested benefits was unconscionable, against public policy and without consideration.

2. Whether federal preemption precludes petitioners from bringing their damage claim against defendant Avco for fraud in misrepresenting and failing to disclose the facts during contract negotiations indicating the closing of the plant.



3. Whether petitioners' pension plans were properly funded by Avco as to the amounts which should have been placed therein, and, further, were said plans properly funded pursuant to instructions and recommendations of the plans' actuary.

4. Whether defendant, Avco, owed a fiduciary or contractual duty to petitioners to notify Chemical Bank (the trustee) of the projected plant shut down and pension plan terminations when such facts became known by Avco and whether such duty was breached.

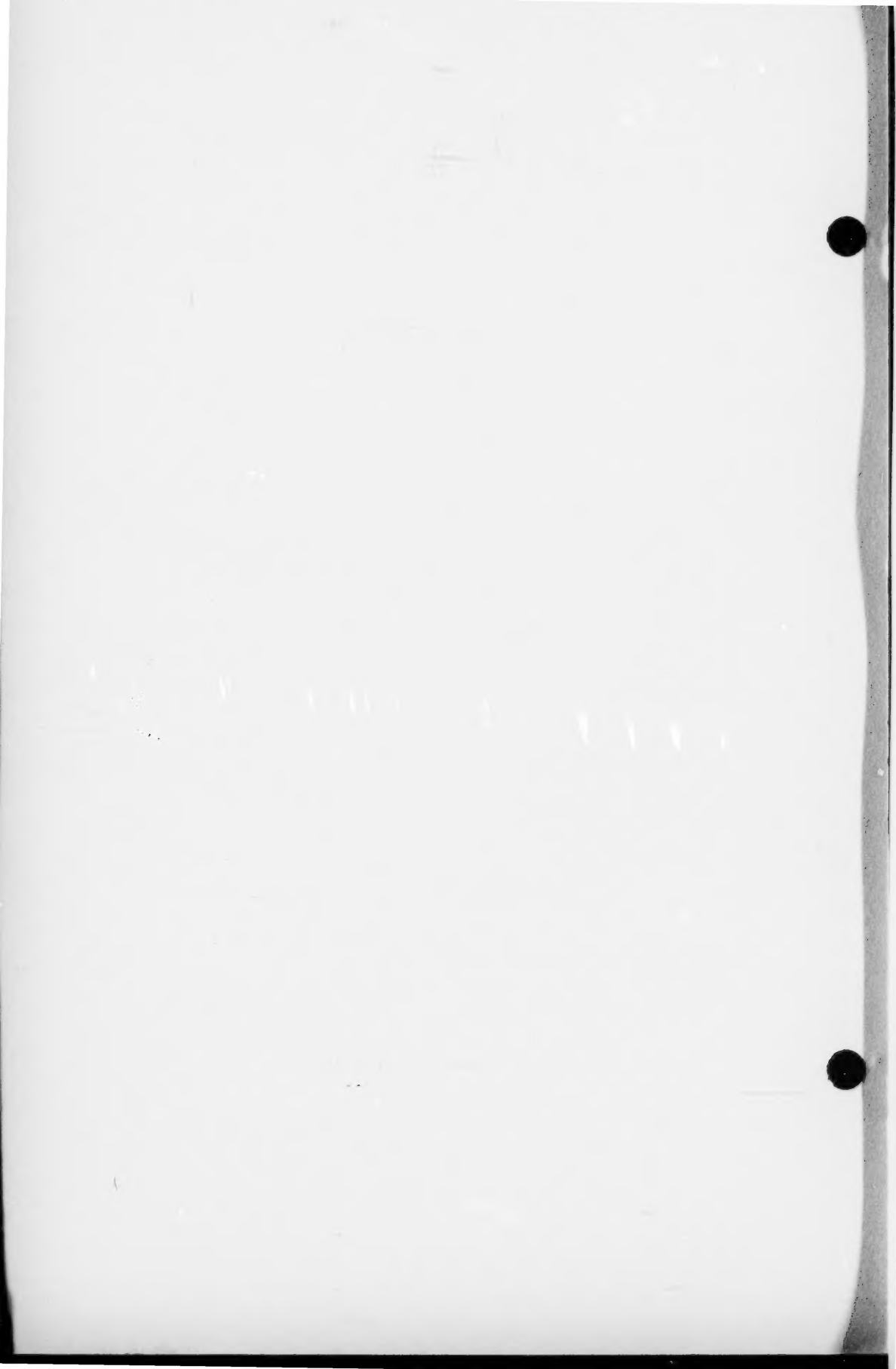
5. Whether defendant, Chemical Bank, owed a fiduciary and contractual duty to petitioners to segregate the plan assets at an earlier date or to advise Avco to notify Chemical Bank at an early date of significant events such as the projected plant shut down and



plan terminations and whether it breached such duties.

#### PARTIES TO THE PROCEEDING

Petitioners, Michael Kolentus, et al. consist of seventy-six named retirees of defendant Avco Corporation's Avco Precision Products Division in Richmond, Indiana (designated at the caption of the District Court's Entry of October 11, 1983 (App. A, p.A-1)), on their behalf and on behalf of several hundred other retirees similarly situated. The District Court, in said Entry of October 11, 1983, certified petitioners as a class. All defendants are designated in the said caption.



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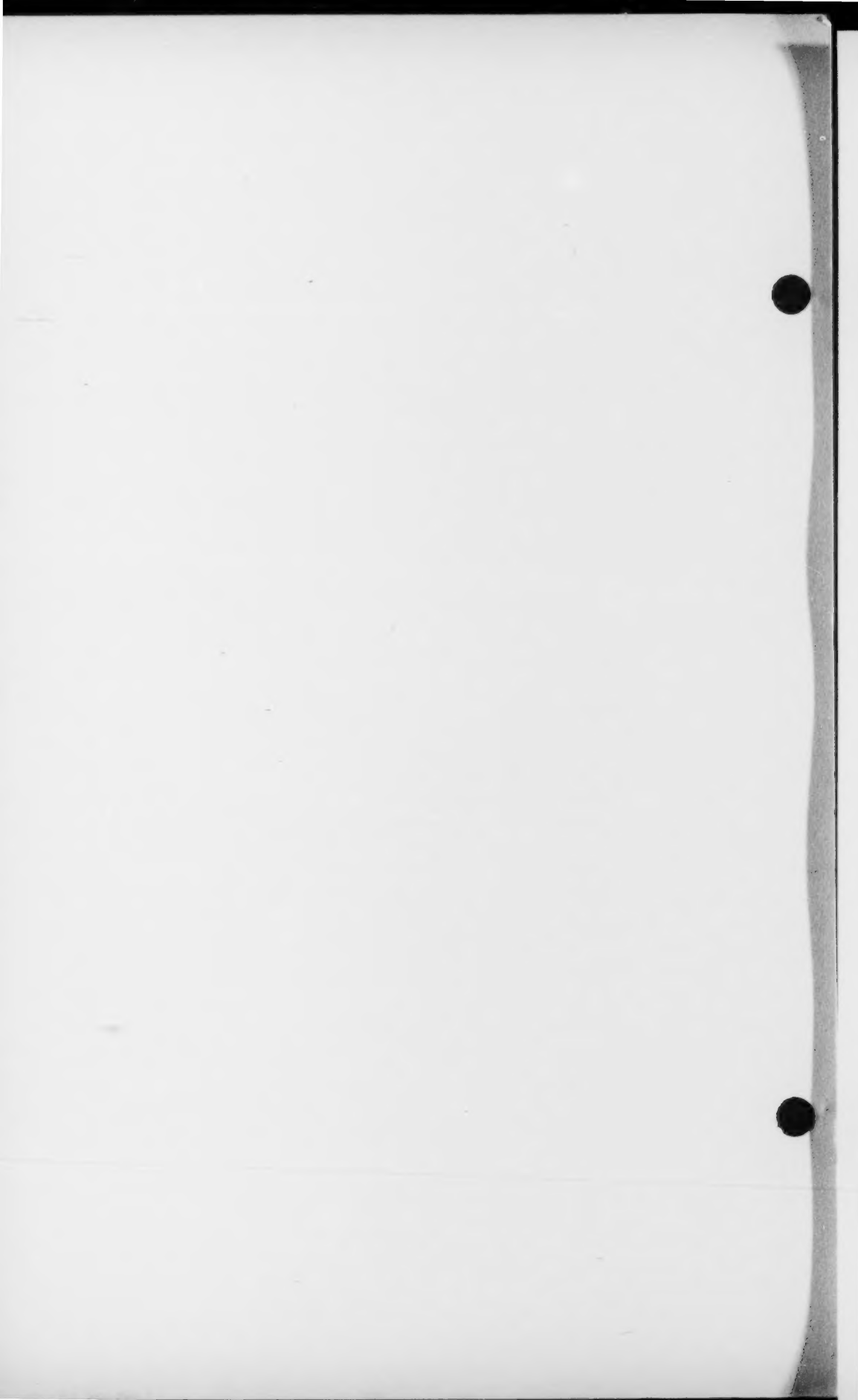
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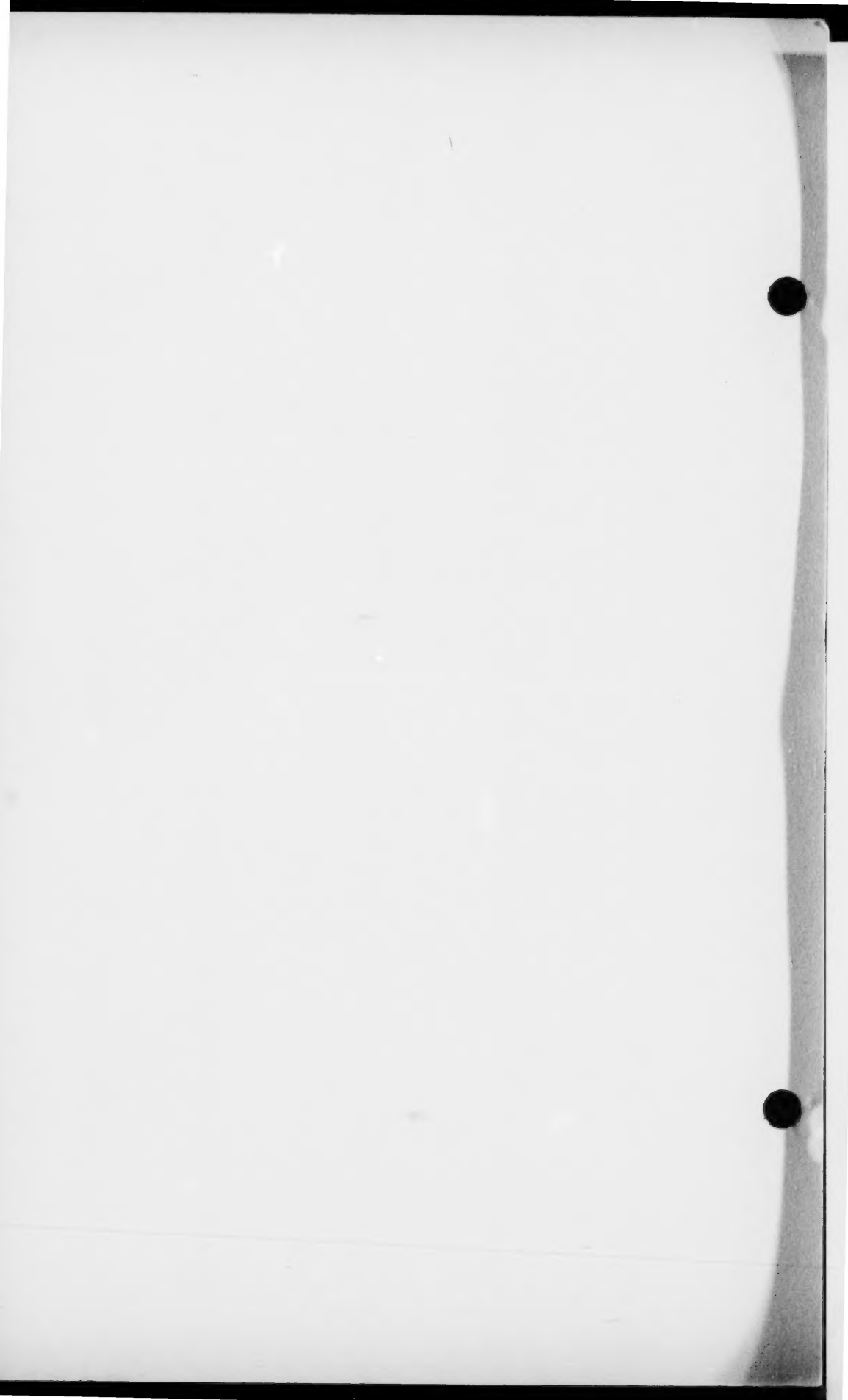


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No.

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Petitioners,

v.

AVCO CORPORATION AND AVCO PRECISION PRODUCTS  
DIVISION, AVCO CORPORATION, AND CHEMICAL BANK  
Respondents.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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Petitioners, Michael Kolentus, et  
al., petition for a writ of certiorari  
to review the judgment of the United  
States Court of Appeals for the Seventh  
Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals  
(App. C) is reported at 798 F.2d 949.  
Neither the Entry and Memorandum (App. A)  
of October 11, 1983 nor the Judgment,



Findings and Fact and Conclusions of Law (App. B) of the District Court are reported.

#### JURISDICTION

The Judgment and Opinion of the Court of Appeals (App. C) were entered on August 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

#### STATUTORY PROVISIONS

Pertinent provisions of 29 U.S.C. Secs. 304-305 (Welfare and Pension Plans Disclosure Act), N.Y. Est. Powers and Trusts Laws, Section 11-1.7 and 29 U.S.C. Sec. 1110 (Employee Retirement Income Security Act) are set forth in Appendix D.

#### STATEMENT

##### A. The Parties.

Avco Corporation had a long history at its Richmond, Indiana plant, engaging



in various manufacturing pursuits from 1929 until 1974. Avco remains a thriving, diversified corporation. For example, in fiscal year 1981, Avco showed total revenues of \$2,325,643,000.00, net income of \$70,012,000.00 and assets of \$6,062,848,000.00. Defendant, Chemical Bank, doing business in the state of New York, was the trustee of the pension plans in question from creation to termination.

Petitioners were former hourly employees of Avco's Richmond plant and were members of certain collective bargaining units.

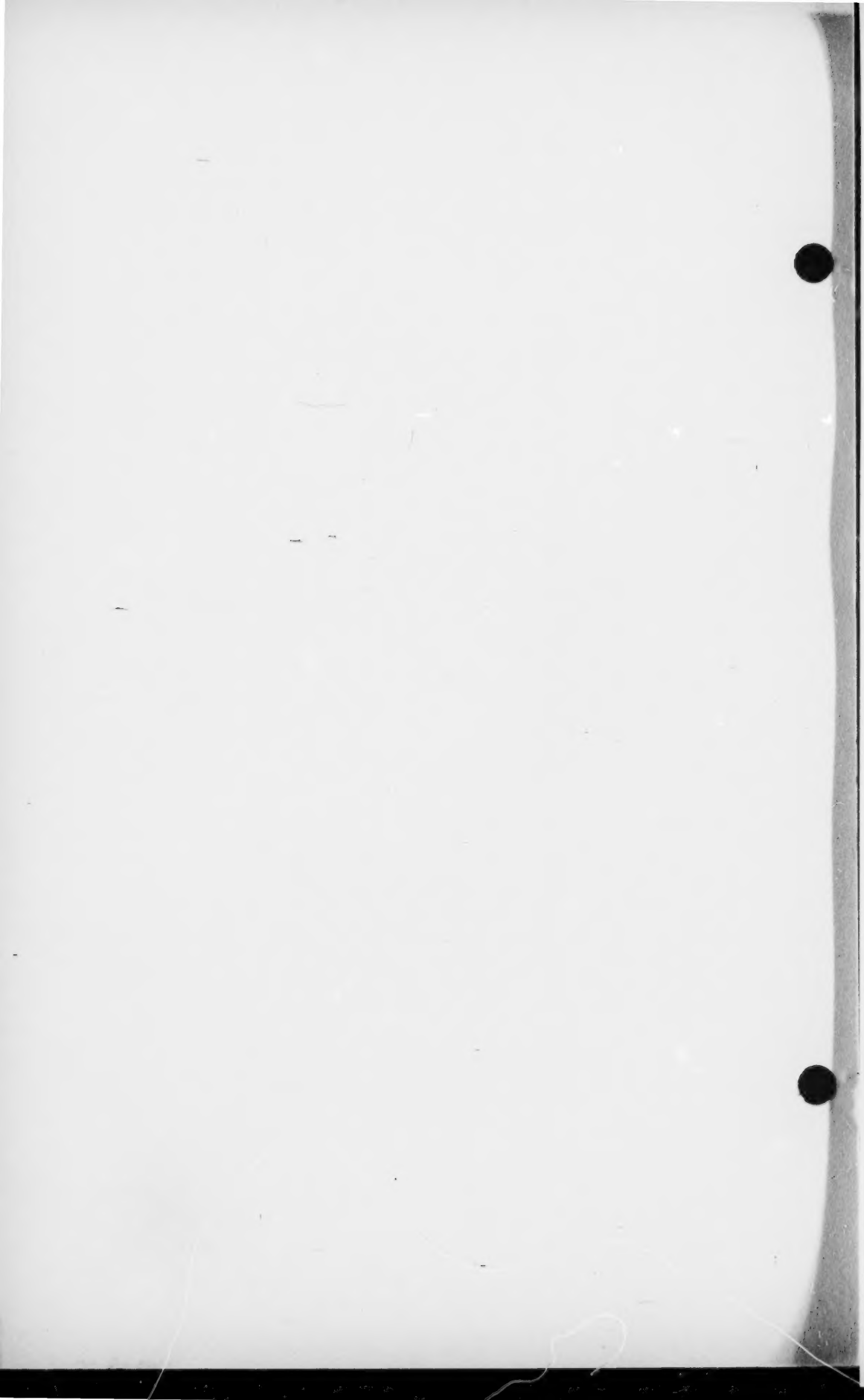
B. Pension and Other Agreements Between Plaintiffs and Avco.

Throughout the years in question (commencing in 1957), collective bargaining agreements were entered into by Avco and each collective bargaining unit. Each collective bargaining agreement



provided that the subject of pensions will be contained in a separate amended supplemental agreement covering pensions. The Pension Plan For Hourly Rated Workers of Avco Corporation (hereinafter "The Plan") was supplemented from time to time in conjunction with each collective bargaining agreement. The Plan and supplements thereto were lengthy and technical and not distributed.

Said pension agreements provided certain rights and guarantees to plaintiffs as to pension benefits, and increases thereto. As an example of the amount of benefits involved, the normal retirement benefit for a member of the IBEW was increased from \$4.00 per month in the 1969 Agreement to \$7.00 per month in the 1972 Agreement, then multiplied by



the number of years of credited service of the employee.

C. Petitioners' Expectations.

Upon adoption of the pension plans, Avco distributed booklets to petitioners entitled "Your Pension Plan" explaining the various benefits of the plans. No indication is given in said booklet that pension benefits could be terminated in any event while the plans are not adequately funded to provide vested benefits. It is clearly stated, however, that the pension checks will be received as long as the pensioneer lives.

Upon retirement of each petitioner, he or she was given documents designating pension benefits to be received. Several retirees received such documents at or about the same time as the



terminations of the plans.

D. Petitioners' Claim For Fraud Against Avco.

Petitioners contend that at the time of negotiating for and entering into the last collective bargaining agreements and pension plans, Avco had knowledge of the facts indicating the closing of the Richmond plant and acted fraudulently in misrepresenting and failing to disclose said facts. During the course of such negotiations, Avco representatives were questioned as to the financial status of the Richmond plant as well as the future continuation of the plant in Richmond and whether there were any plans to phase out or shut down the plant. In response, Avco representatives stated that there were no reasons to believe that the plant would shut down or phase out, and that the plant would remain open. The employee representatives



relied upon this representation in entering into the agreements with Avco, and the retirees were ultimately damaged by same.

E. Termination of the plans.

Avco terminated the pension plans for IBEW, Tool and Teamsters on August 31, 1974 and for the Guards on May 31, 1975. Avco made no further contributions to the plans subsequent to termination. Upon termination, there were insufficient assets in the plan to provide coverage for the vested pension benefits set forth in the pension agreements.

Notwithstanding other provisions of the plan as to benefits retirees are to receive, Section 2 of each supplemental pension agreement states that by payment of normal contributions, as recommended by an independent actuary, sufficient to



cover the costs of benefits, Avco shall be relieved of any further liability and that pensions shall be payable only from the pension fund. Section 10 of the last prior pension agreement provided that Avco may terminate the agreement as of any date on or after which it shall have permanently discontinued manufacturing operations at the plant by the service of 60 days written notice. Pursuant to Title IV of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1301 et seq., which became effective September 2, 1974, the Pension Benefit Guaranty Corporation (PBGC) ultimately assumed responsibility for and was appointed trustee of the plans, at which time the defendant, Chemical Bank, the trustee of the pension plans turned over the assets of the plans to the PBGC. The provisions



of ERISA and the role of PBGC are not directly related to the issues of this petition.

Because of certain retroactive guarantee provisions of ERISA for plans terminated prior to its enactment, the PBGC has thereafter paid benefits under all four plans, as limited by the provisions of the Act. For example, an IBEW retiree of 30 years of service who would otherwise be entitled to \$210.00 per month, as bargained for, was reduced to \$140.00 per month and the death benefit of \$1,000.00 was not guaranteed.

F. Underfunding.

The plan provided that the adoption of all actuarial methods, tables and assumptions under the plan shall be assumed by the Executive Committee of Avco. The Supplemental Agreement stated that Avco agrees to include under the



plan all employees, both active and subject to recall from layoff. The Supplemental Agreement further provided that a qualified independent actuary would be selected by the corporation and that on the basis of annual estimates made by the actuary, Avco will make normal contributions as well as past service contributions.

Throughout the history of the plans, the monthly contribution rate was calculated including employees on lay-off status for less than two years. Avco then applied the contribution rate to only employees on active service.

Avco refers to the language of the actuarial valuation report which states that it is understood that, in lieu of the amounts recommended, the Corporation will apply the recommended normal rate to the number of employees actively



employed.

Each valuation report contains a section entitled "Valuation Methods". Through the 11th Valuation, no method is actually defined. Commencing with the 12th Valuation, prepared as of January 31, 1968, and continuing in all Valuations thereafter, to and including the 19th Valuation prepared as of January 31, 1975, the following language is set forth under said section:

"Projected benefit method with aggregate level normal cost and frozen supplemental liability."

Daryl Dean, the chief actuary and president of the Nyhart Company, an actuarial firm of Indianapolis, Indiana, has had considerable experience over a number of years with actuarial determinations relating to pension plans and proper funding thereof. Mr. Dean



testified that if laid-off employees are to be considered in determining the cost per employee to be contributed to the plans, contribution should then be made for those laid off employees, and to apply it to a different group does not correspond with the method of calculation.

Mr. Dean further testified that the actuarial valuation reports required Avco to make contributions for all covered employees included in the valuations, including those on layoff status. He explained that the actuarial cost method indicated in the reports as the aggregate level cost with frozen supplemental liability would support this position.

George Swick, the "independent" actuary for the pension plans from the date of inception of these plans through



their termination, was otherwise retained by Avco and assisted Avco in collective bargaining negotiations and preparing for the terminations of these plans as well as the impact of ERISA.

Mr. Swick testified that Avco's payment, excluding employees on layoff status who were included in the initial computations, was proper. By making monthly contributions based only on active employees, a substantial underfunding occurred.

G. Duty of Avco and Chemical Bank to Protect and Segregate Assets of the Plans.

General administration of the plan was vested in a Retirement Board consisting entirely of Avco executives. The Plan stated that the pension shall be held in trust by a trustee selected by the Executive Committee under a form of agreement adopted by the Executive



Committee which may amend or modify the trust agreement at any time or remove or replace the trustee. The Plan permitted Avco to designate any group or groups of eligible employees or other beneficiaries covered by the plan as a separate class and to direct Chemical Bank (as trustee) to segregate into a separate fund, to be held for the benefit of such class, the prorata share of the then assets of the fund. There was constant inter-relationship between Avco and Chemical Bank regarding administration.

For a considerable period prior to the closing of the plant, Avco recognized ongoing problems with the viability of the Richmond plant. The final decision was made to close the plant just prior to Christmas in 1973.

A press release was distributed to the news media on January 2, 1974, stating



that the Richmond plant will be phased out during the next six months and that the facility was for sale. The Wall Street Journal, on January 3, 1974, described the phase-out and shut down of the plant. Notification was given on January 3, 1974 and January 10, 1974, to the employees of the Richmond plant regarding procedures during the phase-out.

Eduardo Aguirre is a lawyer who has been employed by the trust department of Merchants National Bank in Indianapolis, Indiana, for the past 18 years. He is a vice president and trust officer, having held this position for 10 years, and heads the department for the administration of trust funds for employee benefit plans.

Mr. Aguirre testified that he reasonably expects there to be good



communication by the trustee with the plan sponsor or employer relating to a pension plan, that it would be reasonable and that he would expect the sponsor to notify him if a matter were to arise within the corporation that might affect the pension plan such as a plant closing or a plan termination. He further stated a trustee should reasonably advise plan sponsors to keep the trustee apprised of such matters.

Mr. Aguirre explained that if a corporation or sponsor should tell him of plans to terminate the pension plan, he would move promptly to segregate the account and take the risk out of the portfolio because the long-term objectives of the plan have now become short-term. He stated that he would invest the segregated assets in short-term money market obligations.



Mr. Aguirre stated that segregation should reasonably be made as soon as the plan termination is anticipated, even if as long as three years from the date in question. Mr. Aguirre explained that the need for segregation is not one of attempting to judge the future of the market, but that the assets should be segregated, in any event, for protection. Keeping the funds invested in long-term assets contains elements of speculation and the risk should be taken out of the portfolio. As the result of failing to segregate the assets of these plans into short-term secure, investments rather than long-term, volatile investments, the value of the plans decreased substantially prior to actual segregation.

The trust agreement entered into between Avco and Chemical Bank provided that Chemical Bank shall not be liable



for any loss to or diminishment of the fund, except such as shall be due to its own wilfull misconduct or lack of good faith. Petitioners were not participants in said agreement. Chemical Bank did not, as a matter of policy, advise clients, including Avco, to keep it abreast of major events that are either under consideration or about to occur that are going to have an impact upon the pension fund such as upcoming plant and pension termination.

H. Federal Jurisdiction.

Federal jurisdiction for the Petition for Removal filed by defendants was premised upon: (1) 29 U.S.C. Sec. 185 (Labor Management Relations Act) (2) 28 U.S.C. Sec. 1332. (Diversity of citizenship).



## REASONS FOR GRANTING THE PETITION

1. Petitioners Are Entitled To Receive The Pension Benefits Set Forth In Their Pension Plans.

Petitioners, over a great number of years, provided loyal service to Avco in return, in large part, for their pension benefits, upon which the petitioners relied for their retirement years. The petitioners were, in all respects, led to believe by Avco that their vested benefits, once they qualified for same, would be received for life, and that their heirs would receive the death benefits. Avco, however, an otherwise ongoing, profitable conglomerate, chose to terminate the plans in 1974 and 1975, leaving petitioners only to have a dawning awareness that their expectation of vested or guaranteed benefits was illusory. This important area of the law as described below and in the



context of the facts herein, has not, but should be, settled by this Court.

(a) Petitioners' Pension Benefits Vested Upon Retirement and Otherwise Qualifying for Benefits

Employees have come to think of pension benefits as deferred compensation and employers have encouraged this concept. This has been especially true in unionized industries where unions would make a tradeoff - better pension benefits for less current wages. In 1948, in the case of Inland Steel Co. v. NLRB, 170 F. 2d 247, (7th Cir. 1948), cert. den. 336 U.S. 960, 69 S. Ct. 887, 93 L. Ed. 1112 (1949), pension rights were designated as "conditions of employment", and therefor, a mandatory bargaining subject under the Labor Management Relations Act of 1947. Congress has encouraged pension plans through favorable tax treatment.



The courts have construed pension plans liberally and to effectuate their humane purposes. The general rule is that pension plans formulated by an employer are construed most strongly against the employer. Scott v. Greer, 229 Ark. 1043, 320 S.W. 2d 262 (1959); Freitzsche v. First Western Bank & Trust Co., 168 Cal. App. 2d 705, 336, P. 2d 589 (1959). A pension contract should not be read to make the employer's plan a mere ephemeron and the promise to pay a pension upon performance of the fixed terms a mere illusion. Stopford v. Boonton Molding Company, 56 N.J. 169, 265 A. 2d 657 (1959).

An important concept which has developed in pension cases is that of vesting of pension benefits upon the qualifying for retirement of a pensioneer. This concept provides a property right which cannot be



taken away once vested.

The case of Cantor v. Berkshire Life Ins. Co., 171 Ohio St. 405, 171 N.E. 2d 518 (1960), was an action by a retired employee to recover additional amounts due under a retirement program. The Court, in determining the issue as to whether the employee acquired vested contractual rights in a noncontributory retirement system under a contract in which the employer reserved the right to terminate the contract, stated:

"It is of course axiomatic that, although a contract may be terminated, vested rights which have arisen under such contract are not and cannot be destroyed by such termination.

The concept of employees' rights and of the place of the so-called fringe benefits in relationship to employees' remuneration has undergone a substantial change in recent years.

Due perhaps to the increased span of life, retirement benefits have assumed a more important role in the consideration of an employee



when he accepts employment. Management has recognized this fact and, to encourage career service and to minimize labor turnover which is so costly to industry, has inaugurated retirement programs in addition to Social Security. Some of these programs are supported by joint contributions of the employer and the employee, whereas others, as an inducement to career employment, are supported entirely by the employer.

When pension programs first came before the courts, pensions were construed primarily as mere gratuities by the employer, subject completely to the will of the employer. Later, as contributing pension systems arose, a distinction was drawn between the contributing and the noncontributing types of plan, the first being held to be vested right, whereas the latter continued to be construed as a mere gratuity on the part of the employer which could be withdrawn at any time.

There has been, however, in recent years a gradual trend away from the gratuity theory of pensions. The courts, recognizing that a consideration flows to an employer as a result of such pension plans, in the form of a more stable and a more contended labor force, have determined that such arrangements will give rise to contractual rights enforceable by the employee who has



complied with all the conditions of the plan, even though he has made no actual monetary contribution to the fund." Id. at 171 N.E. 2d 520-521 (Emphasis added).

The Court, in holding for the plaintiff, further stated:

"A retirement program has become a basic part of an employee's remuneration even as his wages are a part thereof, and a consideration flows to the employer as well as to the employee through such a program.

Clearly, under our present economic system, an employee cannot offer a retirement system as an inducement to employment and, after an employee has accepted employment under such circumstances, withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder.

Therefore, whether a retirement plan is contributory or non-contributory and even though the employer has reserved the right to amend or terminate the plan, once an employee who has accepted employment under such plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder.



Plaintiff having complied with all the conditions in his contract entitling him to retirement rights and having reached retirement age under the contract, his retirement rights became vested and Berkshire could not terminate his contract so as to divest him of such rights." Id. at 171 N.E. 2d 522 (Emphasis added).

The Supreme Court of Ohio in the case of Luli v. Sun Products, Corp., 60 Ohio St. 2d 144, 398 N.E. 2d 553 (1979) has more recently affirmed the holding of Cantor. The Court in Luli also noted the case of Briggs v. Michigan Tool Co. 369 F.Supp. 920 (E.D. Mich.S.D. 1974), which held that an employer does not have the right, in terminating a pension contract, to excuse itself from liability already accrued under such contract, notwithstanding provisions similar to those found in the plans herein limiting liability to contributions made to the pension. (See also, Sheehy v. Seilon, Inc., 10 Ohio St. 2d



242, 227 N.E. 2d 229 (1967); Delaware Trust Co. v. Delaware Trust Co., 43 Del. Ch. 186, 222 A. 2d 320 (1966); Parsley v. Wyoming Automotive Company, 395 P. 2d 291 (Sup. Ct. Wyo. 1964)).

In the case of Hoefel v. Atlas Tack Corp., 581 F. 2d 1 (1st Cir. 1978), the company had instituted a pension plan pursuant to a collective bargaining agreement which provided for monthly pension benefits to be paid to retirees upon qualifying for retirement. A summary of benefits was distributed to employees which stated that since future changes and conditions cannot be foreseen, the company reserved the right to change, suspend or discontinue the Plan at any time.

The Court of Appeals stated that public policy requires that pension plans be construed, where possible, to



avoid the forfeiture of rights which an employee, through years of service, has earned. The Court noted that while the company reserved the right to discontinue the plan, it never explicitly told its employees that discontinuance could cut off payments of pensions already earned. The trial court had based its decision in favor of plaintiffs upon both a contractual claim as well as the doctrine of promissory estoppel. The Court of Appeals affirmed the contractual claim and noted that, because of this resolution, there would be no need to rule on the trial court's alternate ground of estoppel. It appears from the Court's reasoning, however, that estoppel would have also been affirmed as a valid theory of recovery.

As in Hoefel, the petitioners in the present case were led to believe by



Avco that their pension benefits would be received for a lifetime. As in Hoefel, Avco did not reveal and make known to the employees that the plan might be terminated and that the promise of a pension might be a mere illusion, from Avco's standpoint, to be unfulfilled at its unilateral whim.

The case of Hurd v. Hutnik, 419 F. Supp. 630 (D.N.J. 1976), involved a multi-employer pension plan in which the employers entered into an agreement with the union eliminating further contributions to it, while making no provision for the financial protection of employees who had retired. Language limiting the agreement to contribution "without guarantee of benefits" appeared in the collective bargaining agreement which expired in 1969. The Court stated that it was immaterial as to whether or



not the provision had been inadvertently omitted in subsequent agreements because, if it had any meaning at all, it referred to the agreed level of benefits and not to the agreed duration of benefits. The employers contended, as does Avco in the present case, that upon termination of the pension plan the vested rights of the retirees were limited to the assets in the fund on the day of termination and that the employers never expressly guaranteed the payment of full monthly benefit levels for the pensioners' lifetime.

A booklet describing the pension benefits, similar to the booklet distributed herein by Avco, had been given to the employees, stating that the pensions are payable for the lifetime of the pensioner, but also referred to the pension plan itself to be fully aware of



the plan benefits. The Court noted that the employers felt it necessary to terminate the plan to avoid the imposition of mandatory insurance as the result of the passage of ERISA, which could have resulted in their exposure to liability if the plan ultimately failed. In the present case, three of the plans in question were terminated on August 31, 1974, two days prior to ERISA being signed into law.

The Court held that the rights of the pensioners who retired in compliance with the pension plans were vested and such rights could not be diminished nor destroyed. The Court concluded that the pensioners were entitled to a pension for life, upon theories of contract law as well as promissory estoppel, and held that each employer was jointly and severally



liable to provide lifetime pensions to each retiree.

The Court of Appeals herein, quotes from Hurd to the effect that employees may limit their liability to contributions to be made "provided that this limitation is the express intention and understanding of the parties". 419 F.Supp. 655. The Hurd Court continued to state, however, that to give effect to such a limitation after fourteen years of consistent representation to employees that the pension, for which their union had given up current benefits, would be for life is unconscionable. The Court concluded that the employees retired with justifiable reliance on the promise of a pension for life.

Similarly, to permit Avco to terminate and cease funding petitioners' then underfunded pensions, after mislead-



ing petitioners over a number of years that their pensions would be received for life, is unconscionable. It would have been a simple matter for Avco, as did the employer in Boase v. Lee Rubber & Tire Corp., 437 F. 2d 527 (3rd Cir. 1970), (discussed below) to have disclosed the contingent nature of petitioner's lifetime pensions as represented by Avco. Avco, however, chose not to be so candid because of the obvious response which would have resulted.

In Aldernay Dairy Co., Inc. v. Hawthorn Melody, Inc., 643 F. 2d 113 (3rd Cir. 1981), the Court found that the breach in Hurd had occurred because of the termination of the pension plan as well as having permitted a shortfall in the funding, prior to termination, which funding should have provided for



the lifetime benefits set forth in the plan.

The Court of Appeals herein relied upon the case of Boase v. Lee Rubber & Tire Corp., supra., in which a termination clause in the pension agreement of certain salaried officers and employees was upheld. A significant distinction exists between the Boase case and the present case. In Boase, the company was forthright with the employees from the outset and clearly advised the employees that the pension could be terminated at any time. In the present case, the company advised petitioners that they would receive their pension benefits for life and, thereafter, certified the amount which they would receive, even simultaneously to the time of the shut down of the plant. The dictum referred to by the



Court of Appeals from Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 100 S. Ct. 1723, by 64 L. Ed. 2d 354 (1980) is also not controlling because of the circumstances of this case including the understanding of the petitioners as they relied upon Avco's consistent representations over a number of years.

(b) Estoppel, Promissory Estoppel and Effect of Plan Summary Booklets.

The doctrines of estoppel and promissory estoppel have been applied in granting pensioners relief in receiving their pension benefits. Scheuer v. Central States Pension Fund, 358 F. Supp. 1332 (E.D Wis. 1973); Landro v. Glendenning Motorways, Inc., 625 F. 2d 1344 (8th Cir. 1980); Hoefel v. Atlas Tack Corp., supra.; Hurd v. Hutnik, supra.



The doctrine of promissory estoppel as set forth in the Restatement of Contracts, Second, Section 90, is as follows:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does include such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The legal effect of booklets similar to that given herein to petitioners was discussed in the case of Davilla v. Court Employment Project, Inc., 86 Misc. 2d 552, 383 N.Y.S. 2d 140 (1976). The Court held that where the employees' manual and the pension plans were in conflict as to eligibility requirements and where the employee had no actual notice that the eligibility requirements were more stringent than those appearing



in the manual, the employer was bound by the less restrictive provisions. The Court noted that the pension plans and its amendments were not actually given to any employee without the employee specifically asking a supervisor for same, and no one was assigned to explain to employees what their fringe benefits were. The case of Gould v. Continental Co., 304 F. Supp. 1(D.C.N.Y. 1969), also held that the employer was bound by the terms of a plan booklet where inconsistent with the terms of the plan itself.

In Winston v. Trustees, 110 Ill. App. 3rd 163, 441 N.E. 2d 1217 (1982), plaintiffs were denied medical, hospital and disability benefits. Defendants contended that the plan booklet relied upon by the plaintiff contained a provision that all benefits are governed by and are subject in every respect to



the provisions of the plan which alone constitutes the agreements under which payments are made. The Court held that this provision did not sufficiently warn that coverage could be denied, and that defendants should be estopped from denying the benefits upon which the plaintiff had relied.

Erion v. Timken, 52 Ohio App. 2d 123, 368 N.E. 2d 312 (1977) was an action brought by the surviving spouse of a deceased former employee against the employer and the administrator of the pension plan. The Court held that there was a fiduciary relationship between the employer and the employees and that pertinent points of the pension plan should have been brought to the attention of the employees.

The extent to which a plan summary booklet and other representations made



to employees by an employer control over the language of the plan itself must be viewed on a case by case basis. A clear representation by an employer over a period of years which reasonably misleads employees into believing that they will receive their pensions for life but also fails to disclose that such expectation is illusory cannot merely be explained away by a general reference to the plan itself for more details.

As to technical questions which may arise such as the types of benefits and procedural requirements, such reference to the plan may be appropriate. However, when the entire essence of the plan and the right to terminate it and cease any funding thereafter is purportedly within the discretion of the company, the company should be estopped from taking



such position after consistently, over a period of years, leading the employees and retirees to believe that they could rely on their pensions for their lifetimes. Contrary to the statement of the Court of Appeals that the Avco booklet did not address the issue of plan termination and its impact on pension benefits, the misrepresentation upon which petitioners relied exists by selective omission.

(c) Welfare and Pension Plans Disclosure Act.

Avco filed certain documents over a period of years with the Department of Labor as the "Administrator" of the pension plans in question and was considered the Administrator pursuant to the Welfare and Pension Plans Disclosure Act, 29 U.S.C. Sec. 301 et seq. (App. D) The Act, at 29 U.S.C., Sec. 304, sets forth certain requirements on behalf of



the administrator of a pension plan to publish to each participant a description of the plan. To the extent that the booklet, "Your Pension Plan", was an attempt on behalf of Avco to comply with the Act, the said booklet was misleading. The provisions in the Plan to which Avco apparently relies in terminating and failing to fully fund the plan are not explained to the participants and Avco has failed to comply with this Act.

(d) Unjust Enrichment.

The case of Lucas v. Seagrave Corp., 227 F. Supp. 338 (D. Minn. 1967), was brought by former employees against their employer based on quasi-contract or unjust enrichment theories to recover benefits under a noncontributory pension plan following an alleged group termination of their employment. The



pension benefits of the plaintiffs had not actually vested as occurred in the present case. The Court noted that pension costs are commonly substituted for direct cash wages and, further, that, even if an employer has made no promise to vest pension benefits in employees upon their termination before reaching retirement age, this may not relieve him of an obligation to do so. The Court held that where the substantial portion of a plan's participants were terminated, there may be a recovery on a quasi-contractual or unjust enrichment theory based on the extent to which the employer was "unjustly enriched" by its termination of the pension plan. Similarly, Avco has been unjustly enriched by petitioners' years of work.



- (e) Any Provision Permitting Avco To Terminate the Plans Without Adequate Funding For Accrued Vested Benefits Was Unconscionable, Against Public Policy and without Consideration.

In the landmark case of Weaver v. American Oil Co., 257 Ind. 458, 276 N.E. 2d 144 (1971), the Supreme Court of Indiana considered the validity and enforceability of exculpatory and indemnity clauses of a gas station lease. The Court, in holding that said clauses were not enforceable against the lessee, stated:

"When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to



enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting." Id. at 296 N.E. 2d 148

The provision in question is not enforceable because of the underlying circumstances, as set forth above, as well as the fact that Avco had prepared the agreements and was the much stronger party in the bargaining process. Issues of unenforceability of terms on grounds of public policy and, unconscionability are considered in the Restatement of Contracts, Second, as follows:

"Section 178. When a Term is Unenforceable on Grounds of Public Policy.

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by



a public policy against the enforcement of such terms. (2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. (3) In weighing a public policy against

enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberated, and (d) the directness of the connection between that misconduct and the term...

#### Section 208. Unconscionable Contract or Term

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

The case cited by the Court of Appeals, State v. Avco Financial Services



of New York, Inc., 429 N.Y.S. 2d 181 (1980), indicates that the doctrine of unconscionability is intended to prevent oppression and unfair surprise. Under the facts and circumstances in the present case, petitioners would submit that oppression and unfair surprise have occurred.

2. Petitioners Are Not Precluded From Pursuing Their Fraud Claim Against Avco.

The case of San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959), provides the general rule that when an activity is arguably protected or prohibited by the Labor Management Relations Act, the Courts must defer the matter to NLRB. The Court noted, at 79 S.Ct. 779, two exceptions: (1) where the activity concerned is a mere peripheral concern of the LMRA and (2) where the



conduct touched interests so deeply rooted in local feelings that in the absence of compelling Congressional direction preemption could not be inferred.

In Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 83 S.Ct. 657, 15 L.Ed. 2d 582 (1966), this Court stated, at 86 S.Ct. 663-664, that the Board's lack of concern with the injury caused by the alleged defamation and its inability to provide redress vitiates the ordinary arguments for preemption. This Court, in Farmer v. United Broth. of C & J. of America, Local 25, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977), held that preemption did not apply, noting that the Board would lack authority to provide the defamed individual with damages or other relief.



In Sears Roebuck and Co. v. Carpenters, 436 U.S. 180, 56 L.Ed. 2d 209, 98 S.Ct. 1745 (1978), this Court, in discussing the flexibility of the preemption doctrine stated:

"The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented to the state court is identical to (as in Garmon or different from (as in Farmer) that which could have been, but was not, presented to the labor board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the board which the arguable prohibited branch of the Garmon doctrine was designated to avoid." Id. at 98 S.Ct. 1957-1958

In the recent case of Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed 2d 798 (1983), employees who had been hired to permanently replace striking workers and who were later dismissed upon the rehiring of



strikers brought an action against the employer for misrepresentation and breach of contract. This Court held that neither the contract nor the misrepresentation claim was preempted under the Garmon rule and that both state claims fell within the Garmon exceptions. It was also held that, as in Sears, the case was not preempted because the controversy presented was not identical with that which could be presented to the NLRB. It was noted that the state of Kentucky has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm, that, as in Linn, the injury remedied by the state law has no relevance to the Board's function, and that the Board can award no damages or give any other relief to the plaintiffs. Id. at 103



S.Ct. 3183.

Recent commentary regarding the Belknap case has reasoned that Belknap has expanded the "different controversy" exception from Sears to include different remedies and that there is no preemption so long as the state remedy is different from the NLRB remedy. Note, "Labor Law Preemption After Belknap, Inc. v. Hale: Has Preemption as Usual Been Permanently Replaced?" 17 Ind. L. Rev. 491 (1984). (See, also, Magic Chef v. Intern. Molders & Allied Workers Union, 581 F. Supp. 772 (E.D. Tenn., S.D. 1983), Sherman v. St. Barnabas Hospital, 535 F. Supp. 564 (S.D.N.Y. 1982)).

3. The Pension Plans Were Not Properly Funded By Avco As To The Amounts Which Should Have Been Placed Therein, and, Further, the Plans Were Not Properly Funded Pursuant to Instructions and Recommendations of the Plans' Actuary.



The conflicting testimony of Daryl Dean and George Swick were discussed above. George Swick's role as an "independent" actuary as required by the Supplemental Pension Agreement as well as his testimony are questionable. The problem is particularly apparent in light of the power of the Retirement Board, and the Executive Committee of Avco regarding the administration of the plans and the actuarial procedures and methods to be used. Petitioners would submit that, although this issue involves the review of a factual determination, further review is warranted and necessary as to the underfunding by Avco.

4. Defendant Avco Owed a Fiduciary and Contractual Duty To Plaintiffs To Notify Chemical Bank of the Projected Plant Shut Down and When Such Facts Became Known By Avco and Avco Breached Such Duty.



Not only was Avco the plan sponsor, but it had, by the terms of the agreements and by the general assumption of these duties, the responsibility for the general administration of the plans. Avco should have advised Chemical Bank not later than January, 1974 of the projected shut down of the Richmond plant and termination of the pension plans so that Chemical Bank could have taken action to segregate the assets of these plans from the master plan and protect the assets from the exposure and risk of a fluctuating market. Avco assumed responsibility for all communications with Chemical Bank and failed to take reasonable steps to notify Chemical Bank of the facts which existed.

Avco and Chemical Bank engage in a passing of the buck, all to the great



detriment of the petitioners, ~~who~~, caught in the middle, were relying on both defendants to act prudently. Chemical Bank takes the position that it was not responsible for not having segregated and protected the assets at an earlier date because of Avco's failure to notify Chemical Bank. Avco, in turn, contends that it is not responsible for trust investments, this being Chemical Banks responsibility. Although Avco has acknowledged it had fiduciary accountability to petitioners, it contends that this did not include the actual investment of plan assets. Plaintiffs do not contend that Avco was responsible for investments. Avco was the only party, however, in a position to notify Chemical Bank at the earliest possible date, not later than January, 1974, of the facts as they existed so



that Chemical Bank could then take proper action, as it ultimately did, although untimely. This was an administrative, not an investment matter.

An employer has been held to owe a fiduciary duty to employees in regard to the administration of a pension fund. Erion v. Timken, supra. Restatement of Trusts, Second, Section 2, Comment V states:

"Fiduciary Relation. A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. A fiduciary is normally under a duty not to delegate to a third person the performance of his duties as fiduciary."

Restatement of Torts, Second, 874, states:

"Violation of Fiduciary Duty. One standing in a fiduciary relation with another is subject to liability to the other from harm resulting from a breach of duty imposed by the relation."



The Court of Appeals, relying on the case of Shlansky v. United Merchants & Manufacturers Inc. 443 F. Supp. 1054 (S.D.N.Y. 1977), found no duty on Avco's part to notify Chemical Bank of the upcoming plant shut down and pension plan terminations because such duty was not contractually required by the pension agreements.

The Court in Schlansky, noting that a duty not necessarily provided for in the agreement may be otherwise assumed, stated:

"However, it is elementary tort law that where no duty exists a 'voluntary assumption of a duty by affirmative conduct' may arise. See W. Prosser, Handbook of the Law of Torts, Section 56 at 338-48 (4th ed. 1971)". Id. at 443 F. Supp. 1059.

As above, Avco, by the terms of the pension agreement and trust agreement as well by a consistent pattern of conduct over a number of years, assumed full



responsibility for communications with Chemical Bank, and it cannot now be permitted to escape this duty which would have been otherwise prudent (on the basis that such duty is not specified in the agreements).

5. Chemical Bank Owed a Fiduciary and Contractual Duty To Petitioners To Segregate The Plan Assets At An Early Date And, Further, To Advise Avco To Notify Chemical Bank At An Early Date of Significant Events Such As The Projected Plant Shut Down and Plan Terminations, and Chemical Bank Breached Such Duties.

The Court of Appeals upheld the exculpatory provision contained in Section 4 of the Third Amended Trust Agreement which would purport to relieve Chemical Bank's liability except for willful misconduct or lack of good faith. Chemical Bank, one of the largest banks in the United States, holds itself out to the public as having



considerable expertise in the management of pension and trust assets. Avco was alone responsible for designating the trustee and approving the language of the trust agreement for the management of plaintiffs assets. This clause should not be permitted to excuse Chemical Bank from exercising reasonable care in the mananagement of petitioners' monies. As indicated by the Court of Appeals, such exculpatory clauses are not valid as a matter of public policy in the State of New York with regard to testamentary trusts pursuant to N.Y. Est. Powers and Trust Laws, Section 11-1.7. (App. D, p.D-6) The reliance upon such clause in a trust agreement between a professional trustee and an employer arising out of a collectively bargained pension agreement is even more repulsive to public policy than such provision in



a will involving a mere gift from a testator.

Exculpatory clauses have been held to be invalid or unenforceable in other circumstances on the basis that such provision is unconscionable. Weaver, supra. Although the provisions of ERISA do not retroactively apply to this issue, it should be noted, in determining whether public policy should permit an exculpatory clause to apply in this situation, that 29 U.S.C. Section 1110, (App. D. p.D-7) provides that any such provision shall be void as against public policy.

#### CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to clarify the important, unsettled state



of the law in the areas set forth above.

The issues involved are fundamental to the protection of long time employees and the pension benefits for which they have bargained and to which they should be entitled.

Respectfully submitted,

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A P P E N D I X



[Appendix A]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

MICHAEL KOLENTUS,	)	
MARJORIE KOLENTUS,	)	
JAMES H. BEARD,	)	
OSCAR C. THORPE,	)	
BERT RICHARDSON,	)	
THERMAN SMITH,	)	
LEON J. GREEN,	)	
JOE RISK,	)	
CLARENCE C. TAYLOR,	)	
STANLEY W. PRICE,	)	
CHARLES TRUMP,	)	
MEREDITH A. SMITH,	)	
VANCE KETRON,	)	
LOWELL W. ALLEN,	)	
EARL MUSTARD,	)	
JOHN W. ALVEY,	)	
CLYDE H. BOOMERSHINE,	)	
I. HARTER,	)	
VERNON L. SINK,	)	
KARL FLEENOR,	)	
KENNETH W. MANTOOTH,	)	NO. IP 77-689-C
GLEN ALLEN,	)	
CHARLES C. COLE,	)	
HOWARD E. JOHNSON,	)	
ELMER F. McKEE,	)	
DONALD R. BOYER,	)	
LESTER I. MARTIN,	)	
CARL PRICE,	)	
VIRGIL ABRAMS,	)	
MERRITT SHARP,	)	
ARTHUR L. CLOUSE,	)	
JAMES C. LYONS,	)	
BYRON ALSPAUGH,	)	
HAROLD W. PARSONS,	)	
PAUL W. SMITH,	)	
VIRGIL LOVE,	)	
CLYDE DAY,	)	



W. F. BONWELL,	)	
PAUL FLATTER,	)	
GAYLE MORRIS,	)	
J. L. HATFIELD,	)	
OWEN W. LAND,	)	
ELBERT HALE,	)	
KENNETH LEFEVER,	)	
DONALD M. WINE,	)	
FLORENCE C. TREMAN,	)	
THELMA KUTTER,	)	
FRED MOORE,	)	
JULIUS ANG,	)	
MARIE RINK,	)	
PAUL E. SMITH,	)	
CLAUDE M. DAY,	)	
RALPH W. JOHANNING,	)	
STEVE PERSEPONKO,	)	
DON WESSEL,	)	
ESTHER M. BANTA,	)	
HOWARD SUMNER,	)	
RUBY MARTINDALE,	)	
KATHRYN D. CONSTABLE,	)	NO. IP 77-689-C
LETHA ALVEY,	)	
MARY C. SHULL,	)	
BERTHA TERAPAK,	)	
LOLA M. TURNER,	)	
GEORGIA MENDENHALL,	)	
WILLIAM J. STALL,	)	
RUSSELL P. SWEIGART,	)	
JOHN L. ROLLER,	)	
MARCUS W. WADDELL,	)	
LAWRENCE W. MILLER,	)	
CLEM BRANDENBURG,	)	
W. WOODROW WILSON,	)	
JOHN F. BATT,	)	
ROSANNA ROTH,	)	
DONALD WIGGER,	)	
HARDING ROSS,	)	
ROBERT E. WILSON, On behalf	)	
of themselves and all	)	
others similarly situated,	)	
Plaintiffs,	)	



	)	
-vs-	)	
	)	NO. IP 77-689-C
AVCO CORPORATION,	)	
AVCO PRECISION PRODUCTS	)	
DIVISION, AVCO CORPORATION,	)	
CHEMICAL BANK,	)	
PENSION BENEFIT GUARANTY	)	
CORPORATION,	)	
	)	
	)	Defendants)

E N T R Y

In accordance with the following memorandum, the motion for summary judgment by Avco Corporation and Chemical Bank is granted in part and denied in part. The motion for summary judgment by plaintiffs is denied, and their motion to certify a class of plaintiffs is granted.

Memorandum

This case arises from the closing of a manufacturing plant in Richmond, Indiana. The Avco Precision Products Division of Avco Corporation, a Delaware



corporation, operated a factory in Richmond employing some 500 persons in the fabrication of television equipment. In 1974 Avco chose to close the plant because the company lost the contract for the goods produced there and could find no other use for the plant. Nowhere in the record is it alleged that Avco Precision Products Division is a separate corporation or entity from Avco Corporation, so we shall refer to the corporation and division jointly as "Avco" throughout.

Some 76 former employees of Avco bring this action, seeking to represent their former co-workers as a class, to obtain pension benefits in addition to those already paid. These plaintiffs are members of the four former bargaining units at the plant, Local 1127 of the International Brotherhood of



Electrical Workers, Local 200 of the United Plant Guard Workers of America, Local 21 of the International Association of Tool Craftsmen, and Local 135 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Each union's collective bargaining agreement included a pension plan. The mechanism for financing the plans was periodic payment by Avco into a pension trust fund. The pension agreements limited Avco's liability to making specified contributions to the fund. When the plant was closed, Avco and the four unions executed agreements terminating the pension plans and agreeing that any further disputes over the pensions would be governed by federal law, as discussed below. All terminations took place on August 31, 1974 except for that of the



Plant Guards, which occurred on May 31, 1974.

The plaintiffs filed a complaint on November 10, 1977 in the Superior Court of Wayne County, Indiana. Shortly thereafter, defendants removed the action to this court. We denied a motion to remand because defendants established a basis for federal jurisdiction both under 29 U.S.C. § 301 and 28 U.S.C. § 1332. Since removal, plaintiffs have twice amended their complaint and have filed two further pleadings in response to motions for more definite statements. Originally, this action named as defendants only Avco and its division. Amendments added Chemical Bank, trustee of the pension fund, and Pension Benefit Guaranty Corporation (PBGC), a federally chartered, quasi-governmental corporation, as defendants.



Plaintiffs submit several potential theories for the recovery of additional pension benefits, and it is useful to outline them here before proceeding to a fuller discussion of the pending motions. They charge that Avco may not legally escape payment of vested retirement benefits under the terms of the collective bargaining agreements and that the benefits cannot be terminated under theories of promissory estoppel and unjust enrichment. They state that federal law governing pension disclosure also creates liability in Avco. They allege that Avco failed to maintain the pension fund in accordance with appropriate actuarial standards. They also aver that Avco committed fraud by entering into and completing collective bargaining agreements with some or all of the bargaining units without disclosing its intent to close the Richmond plant.



Against Chemical Bank, plaintiffs allege a breach of fiduciary duty as the plan's trustee in that Chemical failed to appropriately protect the plan's assets from large losses just prior to the plant closing, when large liabilities against the fund would accrue. Plaintiffs charge, finally, that PBGC has failed to properly fulfill its statutory duty to pay all vested, nonforfeitable benefits to plaintiffs when it took over as trustee of the insolvent pension fund.

Plaintiffs have moved for summary judgment against Avco on all their theories except fraud, asking this Court to delay judgment on the fraud claim because appropriate evidence to support the claim cannot be adduced without further discovery. Avco and Chemical Bank have joined in a motion for summary judgment against plaintiffs, essentially



alleging a failure to state any claim upon which this Court could grant relief. Plaintiffs also have moved to certify their class. We already have denied motions to dismiss filed by Chemical Bank and PBGC.

### Discussion

Prior to dealing with the individual claims made by the parties, it would be useful to describe briefly the Employee Retirement Income Security Act of 1974 (ERISA), a statute on which both sides place some reliance. ERISA is a complex statute designed to protect workers' pension benefits. It was signed into law on September 2, 1974, just two days after three of the pension plans involved in this action were terminated; some of its provisions, however, are retroactive. A complete description of ERISA's provisions would fill a book.



For our purposes, it is enough to say that:

One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid when pension plans are terminated. Congress found "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." ERISA §2(a), 88 Stat. 832, 29 U.S.C. §1001(a). Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--that he actually receive it.

Nachman Corp. v. Pension Benefit

Guaranty Corp., 446 U.S. 359, 374-

75, 100 S.Ct. 1723, 64 L.Ed. 2d 354

(1982). Because ERISA was signed into law two days after the last pension agreements involved in this case were



terminated and because only certain of ERISA's provisions were retroactive, it is possible that not all of the broad protections outlined in Nachman accrue to the plaintiffs here. Only a detailed analysis of particular statutory provisions will disclose the extent of ERISA's relevance to this action.

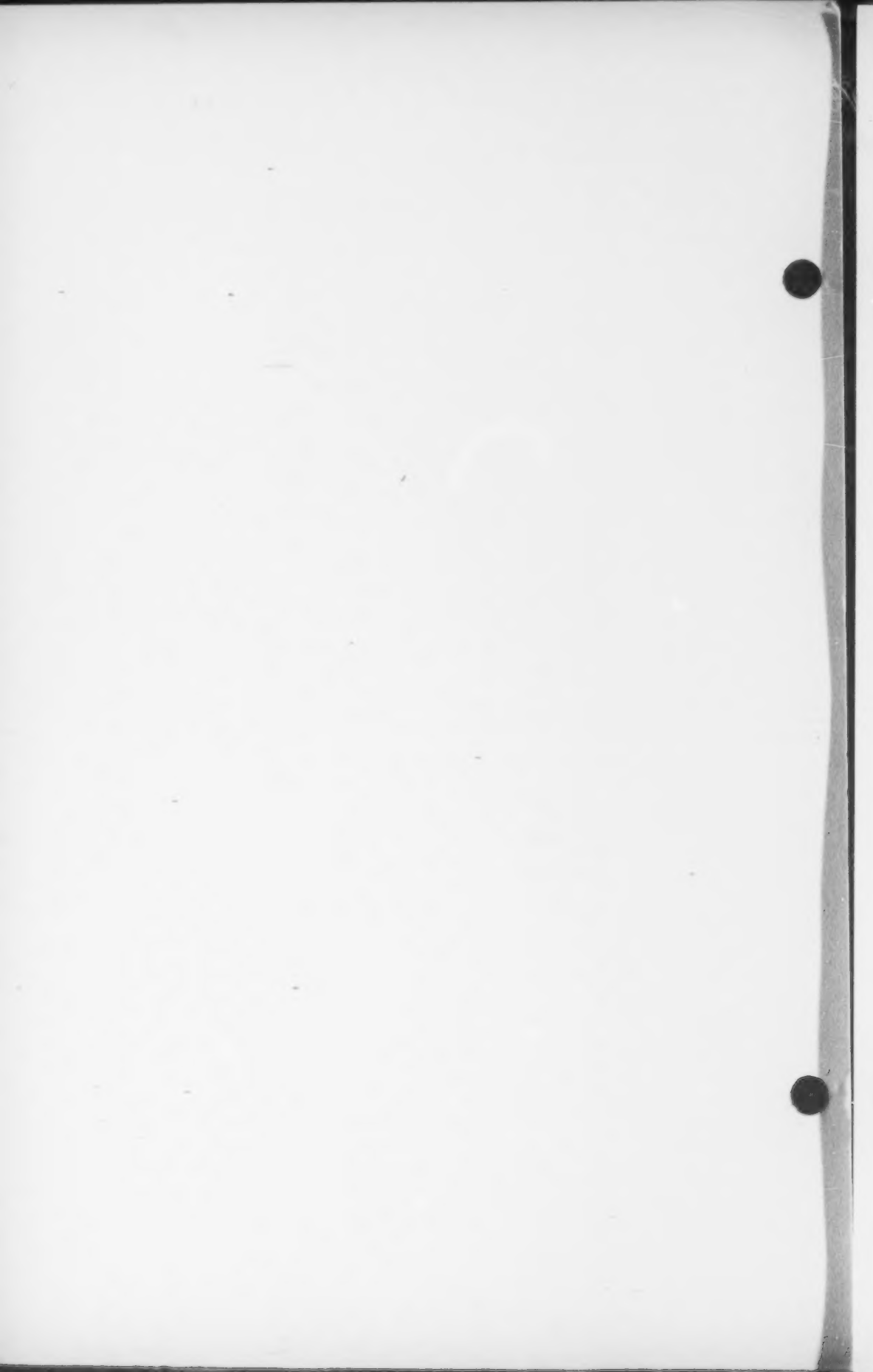
In broad relief, the major substantive sections of ERISA cover reporting and disclosure of plan information (Subtitle B, Part 1), participation in plans and vesting of benefits (Subtitle B, Part 2), funding of plans (Subtitle B, Part 3), responsibilities of fiduciaries (Subtitle B, Part 4), administration and enforcement of the act (Subtitle B, Part 5), and plan termination insurance (Subchapter III). Only the first and last of these provisions have relevance to the case at hand. The first was not in effect in



1974, but its predecessor, 29 U.S.C. §§301-309, was in force. It placed certain requirements on reporting and disclosure of plan information. The last section of ERISA extended plan termination insurance to plans that were terminated between June 30, 1974 and September 2, 1974, as well as to plans terminated thereafter. 29 U.S.C. §1381(b). Most of the sections of ERISA did not go into effect until January 1, 1975 or later.

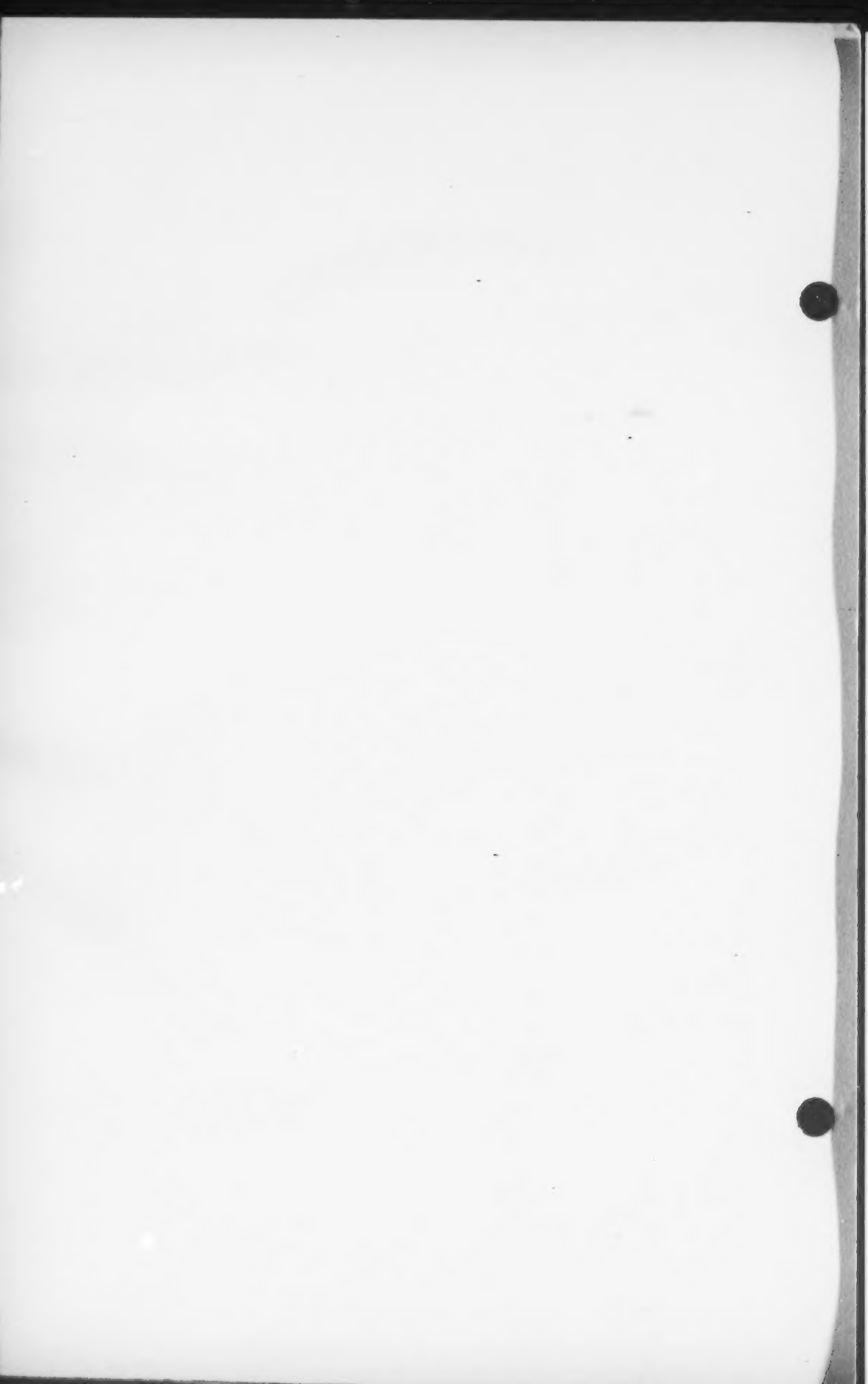
#### The Law Governing Plaintiffs' Claims

While plaintiffs' claims generally are premised outside federal law, Avco and Chemical Bank have argued in their motion that plaintiffs are precluded from recovery because ERISA provides that their only action can be against PBGC and that only PBGC may sue Avco. There are two ways to read Avco's theory



as to its liability to PBGC. The first is that PBGC could collect from Avco under the statutory provision allowing suit by PBGC against the employer whose pension trust fund contains too few benefits to provide for all of its employees, 29 U.S.C. § 1362. Clearly, PBGC could not recover from Avco on this basis. Title 29 U.S.C. § 1381(b) states that "The provisions of Subtitle D do not apply in the case of such a plan which terminates before September 2, 1974." Subtitle D, 29 U.S.C. §§ 1361-1368, authorizes PBGC to collect from employers that have terminated pension plans. This language in § 1381(b) is an absolute defense to any such action by PBGC against Avco or Chemical Bank.

The second theory on which Avco may base its argument that PBGC is the only party that can maintain an action against it is that ERISA authorizes PBGC



to do whatever any other pension plan trustee can do, including bring suit on behalf of the trust and enforce obligations to the trust. 29 U.S.C. §§ 1302, 1303, 1342. None of these provisions, however, was in effect at the time the plan was terminated and this cause of action arose. Neither ERISA nor its legislative history gives any support to the proposition that it was meant to erase legal liabilities existing prior to its enactment. In fact, the statute's provisions for civil and criminal enforcement expressly "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1).

Courts have uniformly held that where causes of action arose prior to the enactment of ERISA, state law claims survive and are not pre-empted by ERISA.



In Malone v. White Motor Corp., 435 U.S. 497, 499 n.1, 98 S.Ct. 1185, 55 L.Ed. 2d 443 (1978), Justice White wrote that:

ERISA, 88 Stat. 832, 29 U.S.C. §§1001 et seq. (1970 ed., Supp. V), provides for comprehensive federal regulation of employee pension plans, and contains a provision expressly pre-empting all state laws regulating covered plans. §1144(a) (1970 ed., Supp. V). Because ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date, it does not apply to the facts of this case [in which the pension plan was terminated on May 1, 1974].

Other courts have similarly held that ERISA does not apply to events taking place prior to its enactment and that state law governs those disputes. See, e.g., Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980); Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978); Vermeulen v. Central States, 490 F.Supp. 234 (M.D.N.C. 1980) (and cases cited); Keller v. Syracuse China Corp., 473



F.Supp. 459 (N.D.N.Y. 1979) (and cases cited); Amory v. Boyden Associates, 434 F.Supp. 671 (S.D.N.Y. 1976).

It would violate the stated purpose of ERISA to deprive plaintiffs here of their state law claims. They would be placed in a worse position than pre-ERISA litigants who could maintain state law actions and a worse position than post-ERISA litigants protected by the full panoply of the statute's provisions. To adopt Avco's reading would be to deprive plaintiffs such as these, whose problems occurred during the transition to ERISA, of the very protection and security that ERISA was supposed to provide.

The law is not clear as to whether the provisions cited by Avco indeed give PBGC a right to sue as trustee for wrongs committed prior to September 2, 1974. It appears that this issue has



not been litigated elsewhere; it has not been appropriately raised here either, as PBGC has not attempted to collect from Avco. There is no substantive provision of ERISA, however, giving PBGC the right to sue for actions occurring prior to September 2, 1974, and the agency appears to believe that it cannot attempt to fasten liability on employers for deficiencies in pension plans terminated before that date. We need not decide whether PBGC could sue Avco on these facts, as we find that the plaintiffs retain their state law causes of action for the wrongs they allege herein.

The cases Avco cites to support its position all involve plan terminations after ERISA was in effect. They therefore are of limited application here. Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 951 n.3



(7th Cir. 1979), aff'd, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1982) ("the Act provides expressly for PBGC assumption of liability without recourse to the employer only for those terminations occurring between June 30, 1974 and September 2, 1974") (termination in 1975); A-T-O, Inc. v. Pension Benefit Guaranty Corp., 634 F.2d 1013 (6th Cir. 1980) (termination in November, 1974); Concord Control, Inc. v. International Union, UAW, 647 F.2d 701 (6th Cir. 1981), cert.denied, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed. 2d 590 (termination after effective date of ERISA); Pension Benefit Guaranty Corp. v. Ouimet, 470 F.Supp. 974 (D.Mass. 1979), aff'd, 630 F.2d 4 (1st Cir. 1980), cert.denied, 450 U.S. 914, 101 S.Ct. 1356, 67 L.Ed.2d 339 (1981) (termination in 1975). Avco's citation of Veale v. Eltra Corp. (W.D.Pa. N. 82-0591, December 10, 1982),



also carries little weight because the case did not involve ERISA and dealt with a situation in which all regular benefits were fully paid.

As well, the issue here should not be confused by ERISA's creation of a federal common law of pensions. 29 U.S.C. § 1144(a); Van Ormen v. American Insurance Co., 680 F.2d 301 (3rd Cir. 1982). This section of ERISA did not become effective until 1975. While it is clear that federal pension law pre-empts state law, Shaw v. Delta Air Lines, 51 U.S.L.W. 5968, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), this pre-emption generally does not affect claims arising before the effective date of ERISA. Fremont v. McGraw Edison Co., 606 F.2d 752 (7th Cir. 1979).



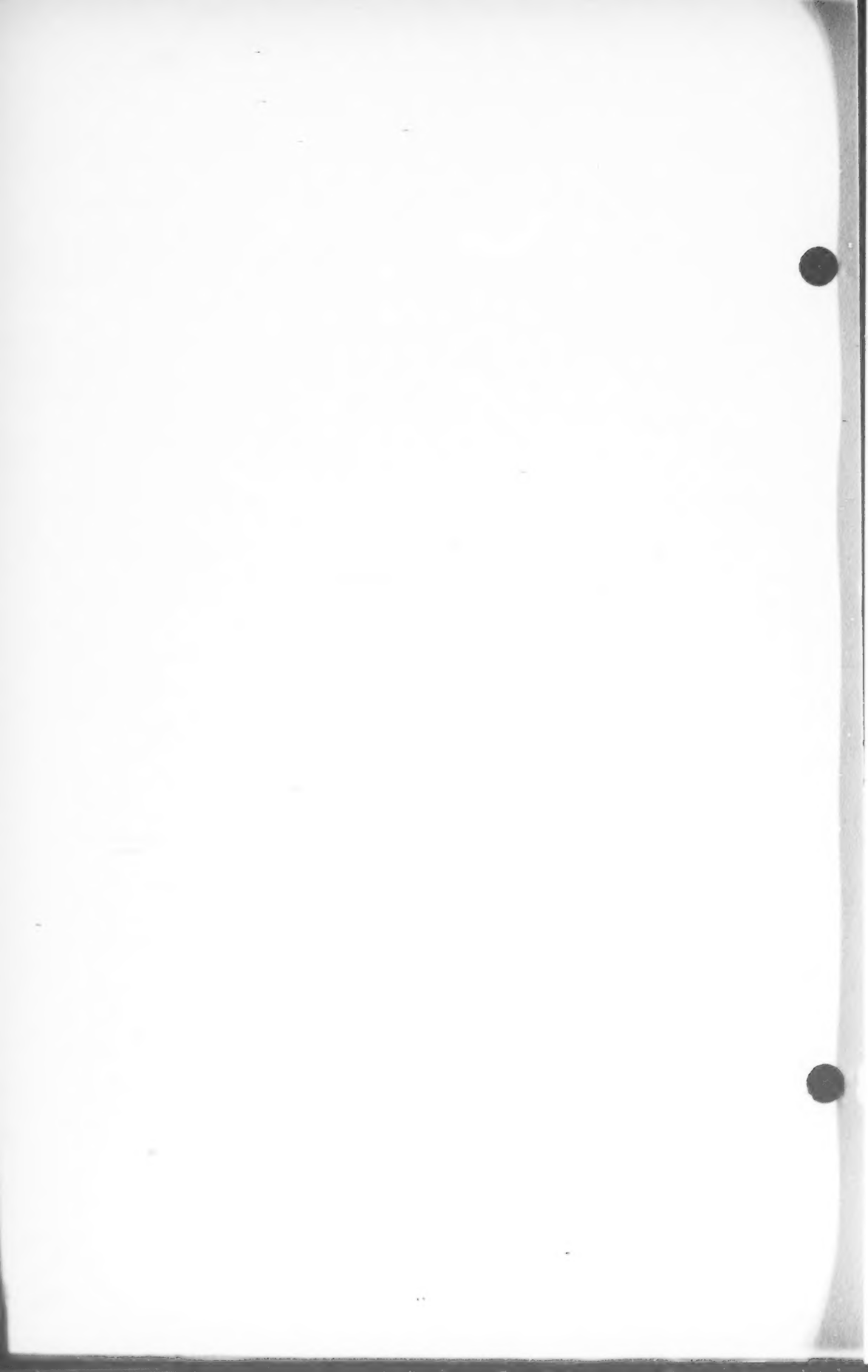
Plaintiffs' Claim of Illegal  
Termination

Plaintiffs first allege that Avco could not deprive them of vested pension benefits by terminating the pension plan. They argue that to do so would deprive them of earned benefits, constitute economic hardship, violate Avco's implied promise, unjustly enrich Avco, violate public policy, and constitute enforcement of a contract made without consideration.

There can be no question that plaintiffs' benefits were vested in terms of the pension plan. It was clear even before ERISA that pension rights vested even when employers included limitation clauses in pension plans. These limitations, however, in some cases reduced the amount of benefits that retired persons could collect. Nachman, 592 F. 2d at 955. The purposes



of ERISA included establishing insurance to pay benefits to workers affected by limitation clauses and creating liability in employers who failed to adequately support pension funds. To believe, however, that benefits must be paid simply because they are vested is to commit "the not uncommon error of reading technical pension language as if it were ordinary English speech." Riley v. MEBA Pension Trust, 570 F.2d 406, 408-09 (2nd Cir. 1977). Plaintiffs' rights were defined by the contract and pension plan, which limited the benefits to the amount of money in the pension fund. Their claim that these vested benefits could not be limited by termination of the plan is grounded in an ERISA-like definition of vesting. It was precisely the lack of a firm definition of vesting to guarantee the payment of benefits to workers that



provoked Congress to enact ERISA.

Unfortunately for the plaintiffs, their plan was terminated too early to benefit from the new law.

Plaintiffs argue that the limitation clause cannot apply because it is not contained in the plan summary booklet distributed to employees. Workers justifiably relied, plaintiffs aver, on the provisions of this booklet in assuming that their vested benefits could not be reduced by plan termination. Their claim is undercut, however, by

Churchwell v. Firestone Industrial

Products Co., \_\_\_ Ind. App. \_\_\_, 431

N.E. 2d 853 (1982). In this case, the plaintiff argued that he was entitled to pension benefits although the plain language of the pension plan excluded him from the eligible class because he had not been employed long enough. He also argued that the plan summary



booklet misled him into believing that he was covered. The court held that the plain language of the plan excluded the claimant from receiving benefits and that the plan summary booklet played no part in the description of the plan's benefits:

Churchwell further contends a benefit booklet must also be considered in resolving the question. The booklet, however, by its express provisions is merely an aid to describe briefly the provisions of the Plan and notifies the employees that "[i]n all cases, the rights and benefits . . . are governed solely by the terms and conditions of each formal Plan." Churchwell cannot avail himself of the claimed contradictory statements because the clear and plain language of the booklet declares that all the benefits are governed by the formal Plan.

431 N.E. 2d at 855. Similarly, the first page of Avco's summary booklet states that the booklet "is not intended as a substitute for the full text [of the plan], and should any questions arise, the Agreement covering pensions



will govern." While we sympathize with plaintiffs' belief, voiced in their affidavits, that their benefits could not be limited by plan termination, Churchwell must control in this instance, as Indiana law is the applicable standard. Avco's disclaimer stands as a limitation of its liability to plaintiffs. Plaintiffs would be wrong to contend that Indiana stands alone in this regard. See, e.g., Anthony v. Ryder Truck Lines, 466 F.Supp. 1287 (E.D.Pa. 1979) (where summary booklet states that plan itself controls, plaintiff cannot rely on booklet).

Plaintiffs also cite Hoefel v. Atlas Tack, 581 F.2d 1 (1st Cir. 1978), cert.denied sub nom., Atlas Tack v. Mahoney, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979), and Hurd v. Hutnik, 419 F.Supp. 630 (D.N.J. 1976), to support their position that contractual



limitation cannot reduce the payment of vested benefits. These cases must be distinguished on their facts, however. In Hurd there was no disclaimer of liability by the employer; in Hoefel there was no limitation clause and the employer promised workers that plan termination would not reduce their benefits. Further, the opinions in both cases were buttressed by strong state policies against forfeiture of pension benefits; Indiana has expressed no such policy in statute or case law, and Churchwell is evidence of a policy that contractual limits are to be respected even when they divest employees of benefits. Avco's disclaimer absolves it from payments beyond the fund to which it contributed. As Justice Stevens wrote in Nachman, "a disclaimer clause would protect an employer from liability to its employees, and . . . there was no



contingent liability to the PBGC on account of termination during this initial period [from June 30, 1974 to September 2, 1974]." 446 U.S. at 382, n.33.

In summary, plaintiffs' claims that their benefits were terminated or reduced illegally cannot withstand scrutiny. The contract and pension plan successfully limit Avco's liability to plaintiffs. Their argument based on public policy and unconscionability notably lacks citation to public policy of Indiana. Plaintiffs' promissory estoppel argument also fails; since Indiana case law precludes reliance on the plan summary booklet, there was no legally enforceable promise upon which plaintiffs could justifiably rely. The terms of the contract and pension plan themselves negate any inference of unjust enrichment.



In passing, plaintiffs also raise the provisions of 29 U.S.C. §§ 301-309, the welfare and pension plan disclosure statute in effect at the time their plan was terminated. These sections, strengthened and recodified at 29 U.S.C. §§ 1021-1031, require Avco to furnish each member of the pension plan with a summary of the plan annually. Neither the statute nor the regulations published under its authority, 29 CFR §§ 461.1 et seq., places upon the employer the affirmative duty to list each and every event that may diminish the benefits eventually payable to the beneficiary. Because of this lack of specificity, unremedied by the case law, we cannot use this statutory scheme to give a remedy to plaintiffs. Even if we could, the statutory penalties for violating the statute then in force fall far short of the damages they claim.



Plaintiffs' motion for summary judgment must be denied, and the motion of Avco and Chemical Bank granted, as to this theory.

#### Plaintiffs' Claim of Fraud

Plaintiffs have submitted affidavits purporting to show knowledge by Avco that the plant in Richmond was to be closed, but they admit the insufficiency of these affidavits to prove their claim under Rule 56. They request, therefore, that this Court delay its decision on Avco's motion for summary judgment on the fraud theory because there is a genuine issue of material fact as to whether fraud took place and because plaintiffs are not able, without further discovery, to present sufficient evidence to establish fraud. Defendants' response is that, whatever the state of the evidence, this Court cannot entertain



a fraud claim based in state law because it is pre-empted by the National Labor Relations Act.

If plaintiffs prove what they allege, Avco's conduct would constitute an unfair labor practice under 29 U.S.C. § 158(a)(5). Plaintiffs' affidavits show that their representatives questioned the company about closing the plant during contract negotiations, and the company's representatives did not disclose any plan to shut down the operation. The company has a duty to disclose information necessary for the union to bargain effectively. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956); NLRB v. Custom Excavating, Inc., 575 F.2d 102, 106 (7th Cir. 1978) ("an employer violates Section 8(a)(5) of the Act if it refuses to give the union information that it needs as the bargaining



representative of a group of employees." ).

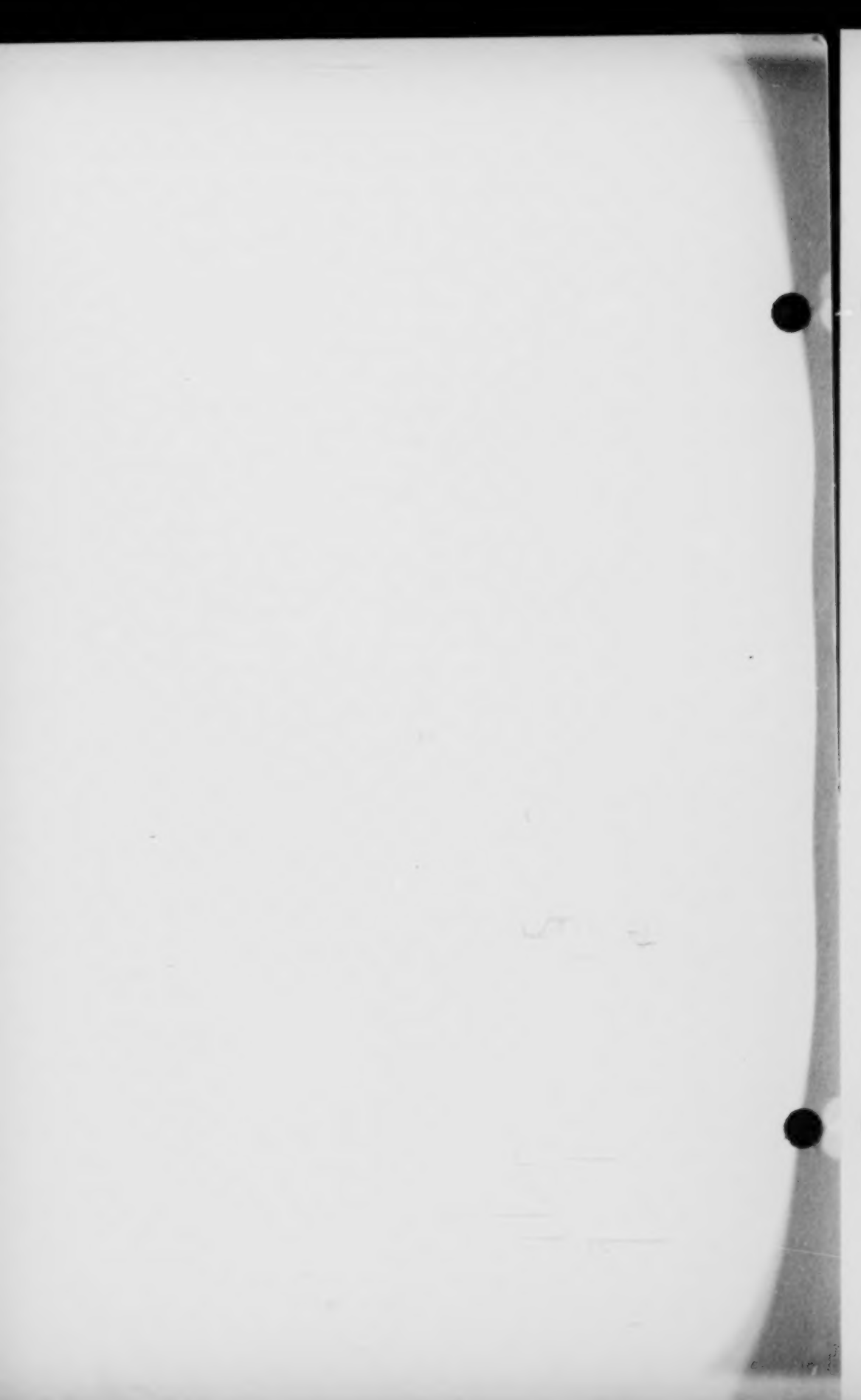
This is not a case where workers assert that management has a duty to bargain over a plant closing. Avco's voluminous citation of authority on that issue misses the mark. Rather, plaintiffs here claim a duty to disclose the fact of a pending closing so that their agents could more effectively bargain for termination benefits and related compensation. It appears from documents attached to the affidavit of Herman K. Burgett that one of the unions involved with Avco filed an unfair labor practice charge in 1974 based on this failure to disclose and that this charge was withdrawn prior to processing by the NLRB.

The difficult question is whether the fact that the company's alleged conduct constitutes an unfair labor



practice automatically removes it from the purview of state law as applied by this Court and vests exclusive jurisdiction in the NLRB. We conclude that the NLRB must have exclusive jurisdiction and that we have no power to deal with plaintiffs' state law claim of fraud.

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard to the federal enactment requires that state jurisdiction must yield." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1969). "[S]tate courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of



the litigation is arguably subject to the protections of §7 or the prohibitions of §8 of the National Labor Relations Act." Association of Journeymen v. Borden, 373 U.S. 690, 693, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963).

There are some exceptions to this general pre-emption of state law application, however. "[T]he decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of con-current judicial and administrative remedies." Vaca v. Sipes, 386 U.S. 171, 180, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Farmer v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056 51 L.Ed.2d 338 (1977), describes the two general exceptions to pre-emption. The first is when the activity in question



is merely a peripheral concern of the federal statutory scheme governing labor. The second is when the state's legal regime is harmonious with the federal labor policies and the state has a strong interest in enforcing its law. In the case at hand the issue is not of peripheral concern to federal labor law. Rather, it is fundamental to the heavily regulated area of collective bargaining. Also, there is no indication that the state's law would be harmonious with federal regulation, see, e.g., First National Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981), and local interest in enforcing fraud laws is not in this case as strong as the federal interest in the regulation of collective bargaining. As in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978), the act challenged by plaintiffs



is the same as the act that could have been presented to the NLRB, and there is therefore a high risk that plaintiffs' state claim would interfere with the action of federal labor laws.

Of course, it is apparently too late for plaintiffs to file another claim with the NLRB. Foreclosure of that forum is, however, no ground for this Court to take jurisdiction. To do so would only provide the perverse incentive for those in plaintiffs' shoes to ignore the agency's filing deadline so as to gain a hearing in federal court. Because the claim is to be heard exclusively by the NLRB, plaintiffs' claim for relief here must fail. Their motion to continue is denied, and Avco's motion for summary judgment granted on this claim.



Plaintiffs' Claims of Violation of  
Fiduciary Responsibility

Plaintiffs submit the affidavit of Daryl J. Dean, an actuary, who contends that his review of documents relating to the pension fund shows that Avco failed to contribute properly to the fund. Plaintiffs also claim that Avco failed to notify Chemical Bank properly of the forthcoming plant closing and that Avco and Chemical Bank failed to carry out their responsibilities as fiduciaries of the plan. The plan appears to have suffered fairly large losses in the financial market just at the time when plaintiffs' claims against the fund were ripening. Plaintiffs' allegation, at bottom, is that Avco and Chemical Bank should have pursued a conservative investment strategy in order not to deplete the pension fund when they knew that the plant closing would straiten it.



Avco responds to Dean's affidavit with its own affidavit, by Walter S. Wilmot, stating that Avco made all appropriate payments to the fund as recommended by its actuary. It does not, however, provide the actuary's estimates nor does it show in any way that its payments matched the actuary's requirements. As to the allegations with regard to Avco and Chemical Bank's other responsibilities as fiduciaries, they respond only with the position that ERISA precludes any action by the plaintiffs against them on these grounds and that only PBGC can assert a claim against them as fiduciaries.

We find that plaintiffs' evidence creates a genuine issue of material fact as to Avco's payments into the pension fund. Hence, we cannot award summary judgment to either party on this issue. Unless there are further attempts to



dispose of it summarily, the issue of whether Avco made the actuarially acceptable payments to the pension fund shall be tried on the merits. As discussed earlier in this memorandum, Avco and Chemical Bank's claim that plaintiffs cannot raise claims against them as fiduciaries is incorrect. The actions no way pre-empts plaintiffs' state law claims against Avco and Chemical Bank. We need not pass judgment as to whether PBGC has a cause of action against these two defendants on this issue, but need only note that plaintiffs' claims are not negated by ERISA. Plaintiffs' claims against Avco and Chemical Bank as fiduciaries also raise genuine issues of material fact; plaintiffs did not seek summary judgment on these issues and did not even name Chemical Bank in their motion for



summary judgment. These claims await disposition by further motions or trial on the merits.

### Class Certification

It is now appropriate to consider plaintiffs' unopposed motion for class certification. We have delayed its consideration until the close of this memorandum for expository purposes only, since the foregoing full discussion of the facts and legal theories of the case facilitates brevity. Plaintiffs do not set forth an explicit proposal for membership of the class, but we presume it to be composed of all former employees of Avco's Richmond plant in whom benefits were contractually vested. Rule 23, F.R.Civ.P., imposes four basic requirements for a class action to be maintained:



- 1) common issues of law or fact must infuse the claims of all class members:
- 2) claims of the named plaintiffs must be typical of those of the class generally;
- 3) plaintiffs must be adequate representatives of the interests of the class as a whole; and
- 4) the class must be so numerous that joinder is impractical.

From the discussion in the previous sections of this opinion, it is clear that each of these requirements is met. All class members have common legal claims against defendants; the bases for the claims are that Avco failed to adequately fund the pension plan, that Avco and Chemical Bank failed as fiduciaries, and that PBGC failed to

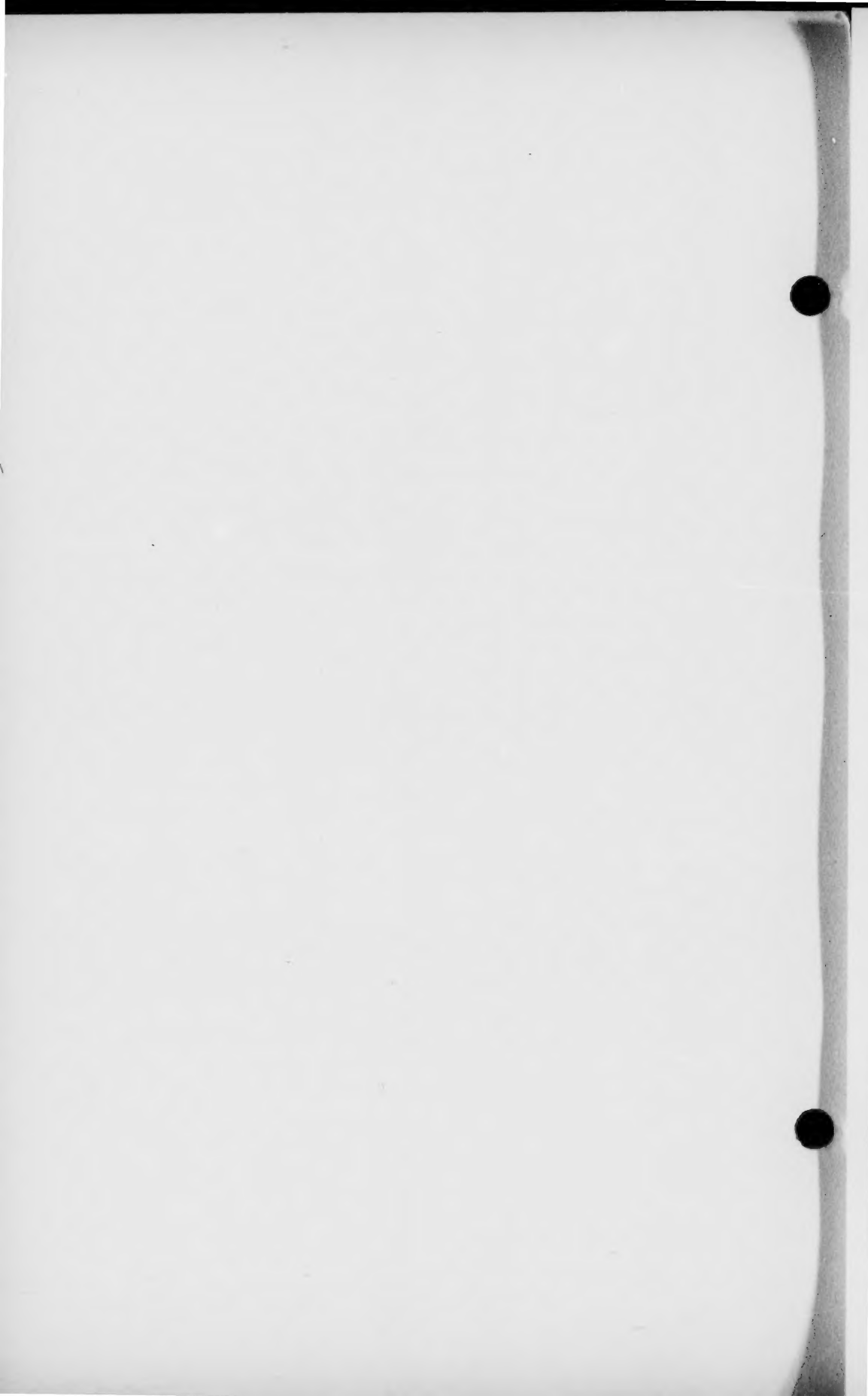


live up to its statutory responsibilities. All potential class members stand to benefit if these claims are resolved favorably. Second, the named plaintiffs' claims are therefore typical of those of the class as a whole. Third, we believe that the named plaintiffs will adequately represent the interests of the class. Their attorneys appear experienced and qualified and they appear to have no interests antagonistic to those of their fellow class members. Fourth, it appears obvious that a class of 500 is too large for joinder to be practical.

With the requirements of Rule 23(a) satisfied, it is necessary to determine into which subcategory of Rule 23(b) the class fits. Initially, it is clear that Rule 23(b)(2) does not apply because plaintiffs claim damages. It appears



that the class fits within Rule 23(b)(1), both because incompatible standards of conduct might be adjudicated in separate proceedings and because the disposition of plaintiffs' claims practically dispose of the claims of similarly situated former employees of Avco. It is unnecessary to determine whether Rule 23(b)(3) applies, then, as the superior res judicata effect of 23(b)(1) makes it preferable when both 23(b)(1) and 23(b)(3) apply. Reynolds v. National Football League, 584 F. 2d 280 (8th Cir. 1978) (and cases cited); Robertson v. National Basketball Association, 556 F.2d 682 (2nd Cir. 1977); Kaplan, Continuing Work of the Civil Committee, 81 Harv.L.Rev. 356, 390 n.130 (1967) ("cases satisfying (b)(1) or (b)(2) will also pass muster under (b)(3) . . . . [These] cases should



ordinarily be treated under the former provisions rather than the latter." ). We hold that plaintiffs qualify as a class under Rule 23(b)(1).

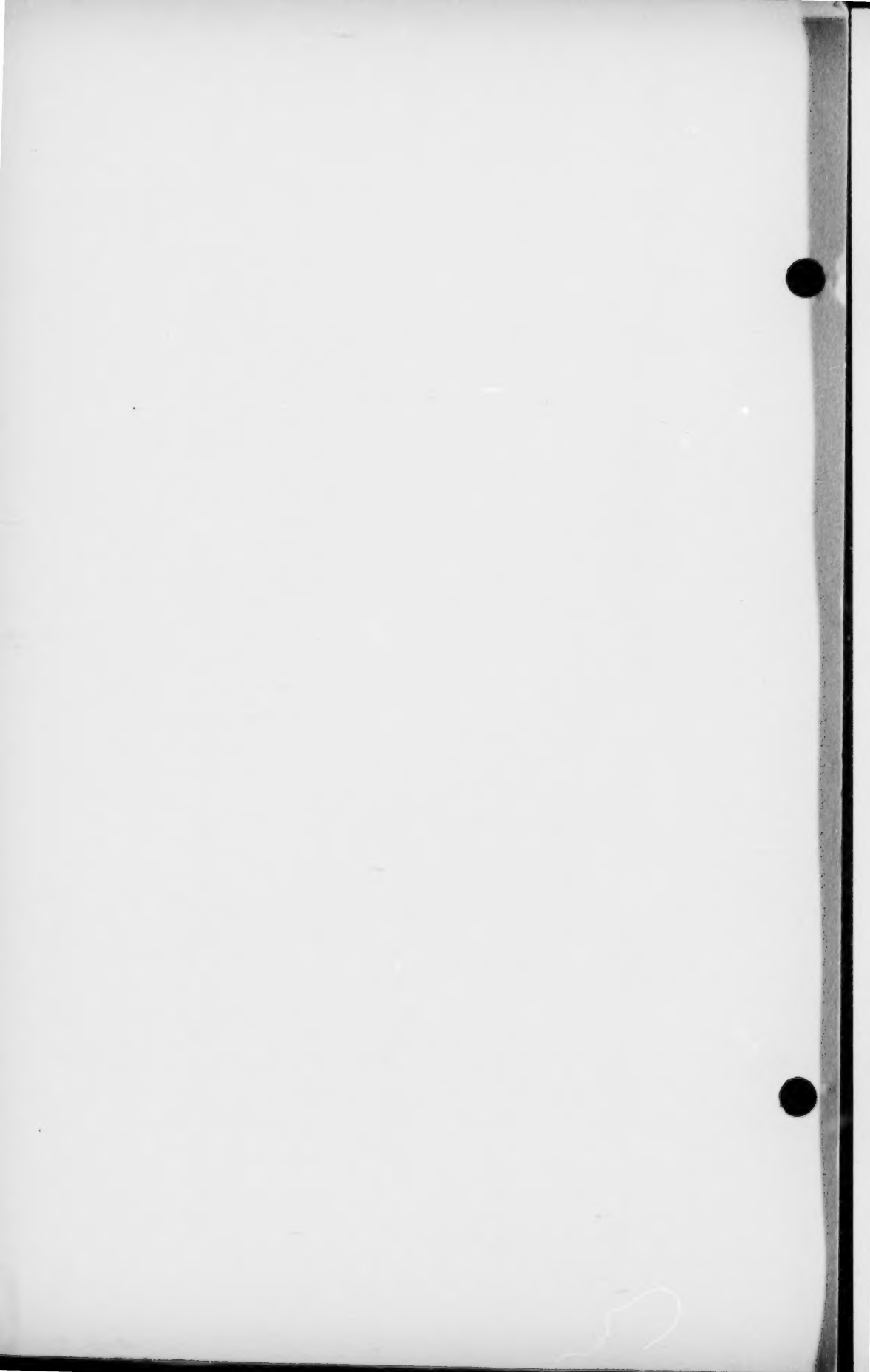
Plaintiffs have submitted that the class be divided into some twenty subclasses, divided by the union membership and benefit category of each particular former employee. At this time, we decline to designate subcategories within the general class. We do so because it is not apparent that the interests of these subgroups necessarily conflict and because it is entirely possible that appropriate relief can be given without enumerating a large number of subdivisions within the class. In general, whether plaintiffs are entitled to relief here depends upon whether Avco, Chemical Bank and PBGC acted appropriately within the



confines of their legally defined roles. The establishment of subclasses will not aid in that determination, nor will it necessarily be required in order to apportion relief appropriately among class members who are covered by different contracts or who are entitled to different types of benefits thereunder. Of course, this Court retains the power to establish subclasses at a later date if it appears useful to do so. Rule 23(c) and (d), F.R.Civ.P.

Dated this 11th day of October, 1983.

/s/ S. Hugh Dillin  
S. Hugh Dillin, Judge



[Appendix B]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

MICHAEL KOLENTUS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	NO. IP 77-689-C
	)	
AVCO CORPORATION AND AVCO	)	
Precision Products Division,	)	
Avco Corporation;	)	
CHEMICAL BANK,	)	
	)	
Defendants	)	

JUDGMENT

The Court having heretofore heard the evidence in the above entitled action, and having this day filed its Findings of Fact and Conclusions of Law, reading as follows: (H.I.).

It is therefore CONSIDERED AND ADJUDGED that plaintiffs take nothing by their complaint.



It is further CONSIDERED AND  
ADJUDGED that plaintiffs pay the costs  
of this action.

Dated this 28th day of December,  
1984.

/s/ S. Hugh Dillin  
S. Hugh Dillin, Judge



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

MICHAEL KOLENTUS, et al.,                    )  
                                                  )  
                                          Plaintiffs,    )  
                                                  )  
                                          vs.                ) NO. IP 77-689-C  
                                                  )  
AVCO CORPORATION AND AVCO                    )  
          Precision Products Division        )  
          Avco Corporation:                    )  
CHEMICAL BANK,                                )  
                                                  )  
                                          Defendants        )

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come before the Court for trial on July 23 and 24, 1984, and the evidence having been heard and reviewed, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

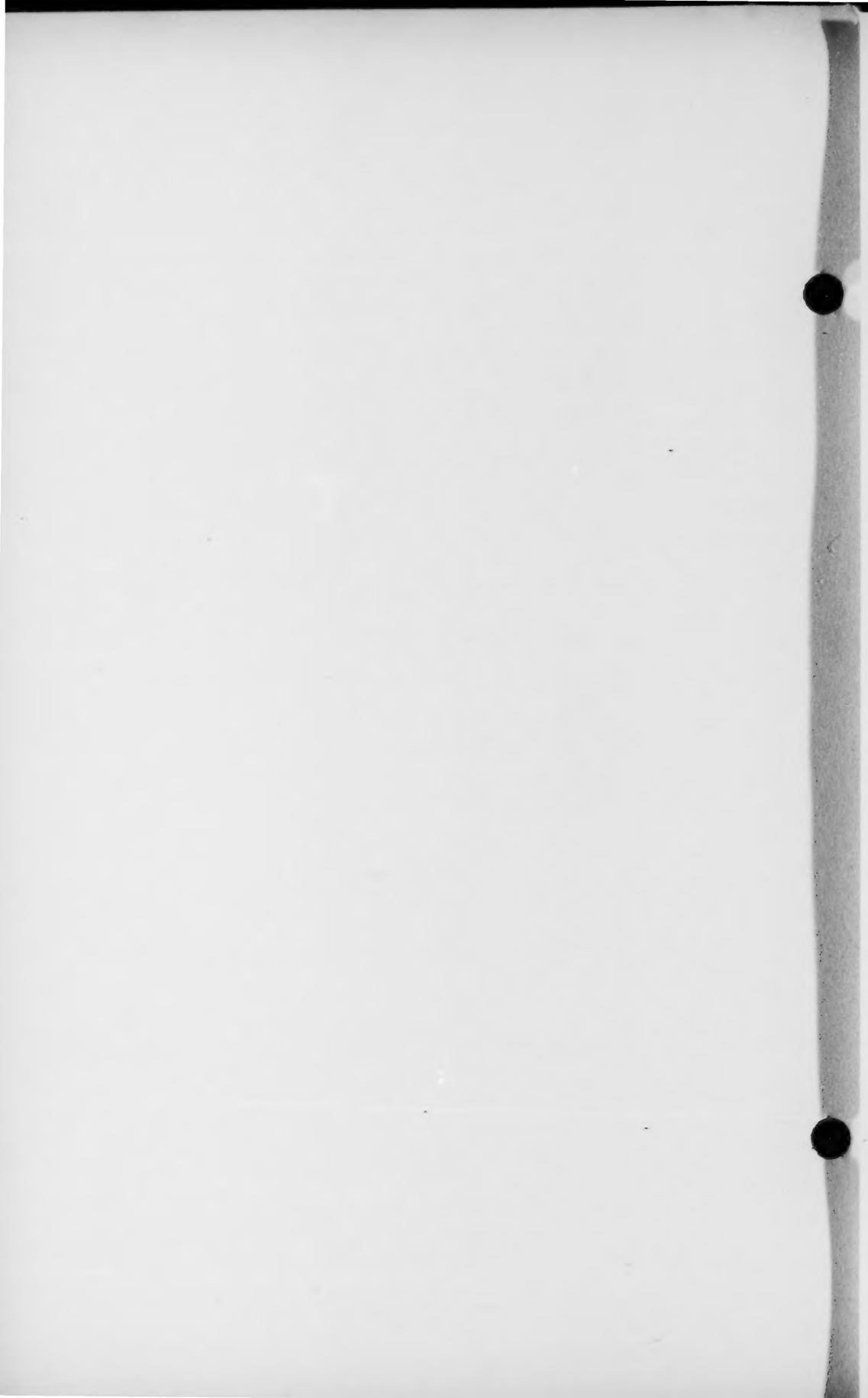
A. The Parties

1. Plaintiffs, having been previously certified as a class, consist



of former hourly employees of defendant, Avco Corporation and its Avco Precision Products Division, located in Richmond, Indiana, said employees having certain vested pension benefits arising from their said employment in years of service. Plaintiffs were members of the following collective bargaining units: Local 1127, International Brotherhood of Electrical Workers; Local 200, United Plant Guard Workers of America; Local 21, International Association of Tool Craftsmen; and Local 135, Chauffeurs, Teamsters, Warehousemen and Helpers.

2. Defendant Avco Corporation was plaintiffs' employer and operated its plant in Richmond, Indiana, over a number of years. Avco Precision Products Division was an administrative division of Avco Corporation which had no separate corporate status and Avco



Corporation was responsible for any obligations of Avco Precision Products Division.

3. Defendant, Chemical Bank, was the trustee for the pension plans in question from their inception through the dates of their termination.

4. Avco Corporation, over a number of years, entered into collective bargaining agreements with each of the said four collective bargaining units, representing plaintiffs. The subject of pensions was not specifically covered in the collective bargaining agreements but, rather, was covered in a separate Pension Plan for Hourly Rated Employees of Avco Corporation (The Plan) and in Supplemental Agreements Covering Pensions agreed upon in conjunction with each collective bargaining agreement. Four pension plans (the pension plans),



for the four union locals specified above, were established thereunder.

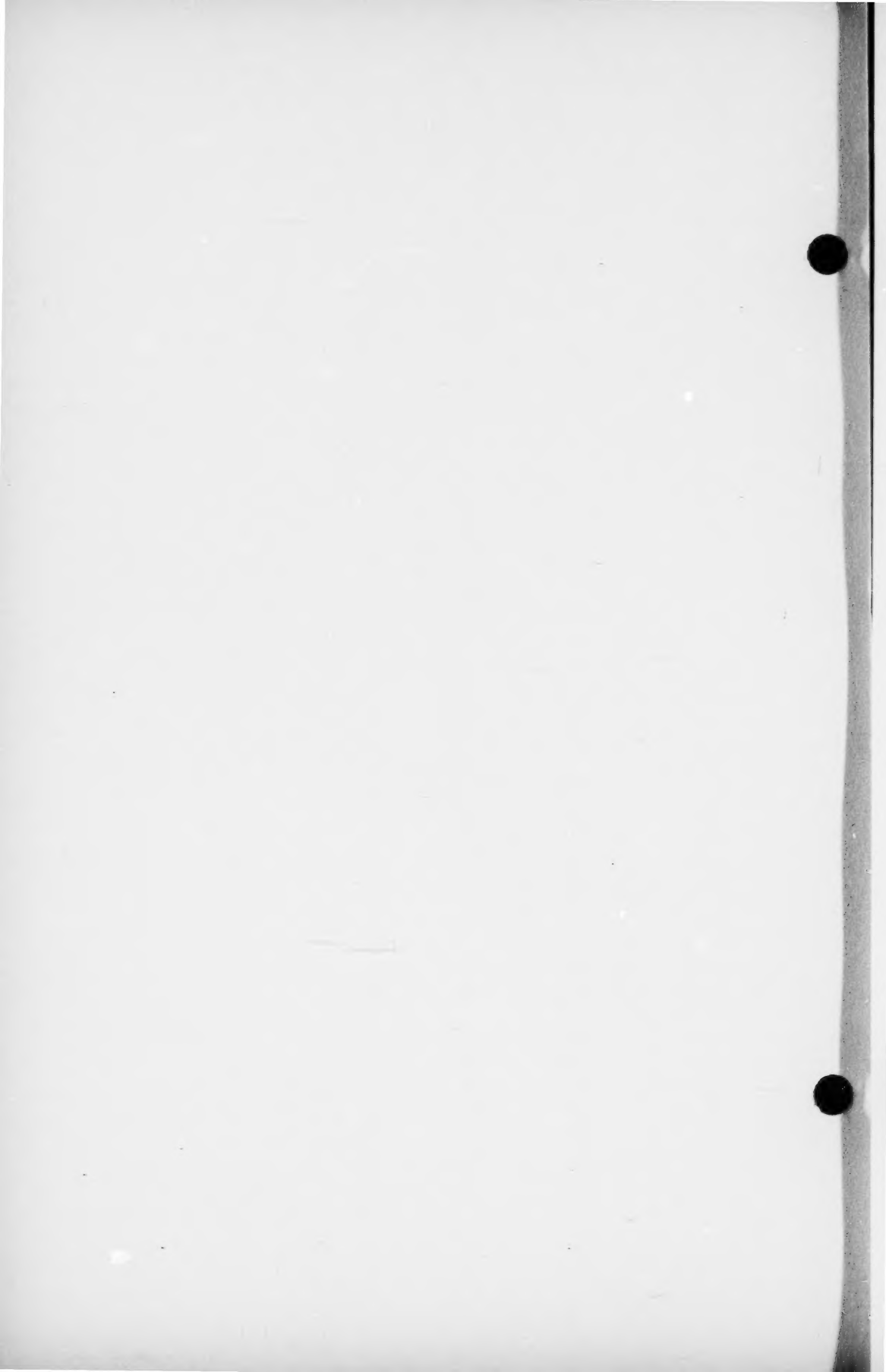
5. The Pension Plan For Hourly Rated Employees was the basic pension plan which was supplemented from time to time by the Supplemental Agreements Covering Pensions. The Supplemental Agreements Covering Pensions for the various years, while maintaining the same basic format, were amended generally to increase the pension benefits therein to plaintiffs. The last such Supplemental Agreements Covering Pensions were as follows: Local 1127 - dated December 11, 1972, effective October 1, 1972; Local 200 - dated January 24, 1973, effective January 1, 1973, with Amendment dated January 24, 1973; Local 21 - dated February 18, 1974, effective November 1, 1974; and Local 135 - dated May 9, 1974, effective December 1, 1973.



B. Funding of the Pension Plans

6. Pursuant to the Plan, AVCO is obligated to fund the pension plans in an amount sufficient to pay the vested pension benefits of the retirees covered by the Plan.

7. Under the Plan, AVCO's hourly employees become entitled to pension benefits in accordance with the number of hours of "credited service". Hours of "credited service" represent hours of compensated work, including allowances made for paid vacation, holiday, and sick days. No allowance is made for days on lay-off and laid off employees do not earn hours of credited service during the period of time they are not actively working within one of the bargaining units at AVCO. Therefore, if no credited service is earned during a certain time period, AVCO has no corresponding obligation to make



current contributions to the pension plans for that time period.

8. Nevertheless, laid-off employees subject to recall (employees laid-off for less than two years) remain as "covered employees" under the pension plans, thus retaining their entitlement to vested pension benefits in accordance with their hours of credited service earned prior to lay-off. Accordingly, AVCO remains obligated to fund the pension plans in an amount sufficient to pay the vested benefits of these employees upon their retirement.

9. From time to time, as the Supplemental Agreements are amended to increase the amount of pension benefits, AVCO incurs the additional obligation to supplement the current or "normal" contribution to the pension plans in an amount sufficient to meet the increased



pension benefit amounts attributable to past "credited service."

10. AVCO therefore makes two types of contribution payments. It contributes the "normal" cost of funding pension benefits based on current accrual of credited service and also makes a "past service" contribution which represents the supplemental liability of AVCO for increased pension benefits for all covered employees. The "past service" contribution also represents the initial liability of AVCO for past credited service incurred when the pension plans were first established.

11. Pursuant to the Supplemental Agreements, AVCO's contributions are made in accordance with the recommendations of an independent actuary. At all times, the actuary for AVCO's pension plans at Richmond, Indiana, was

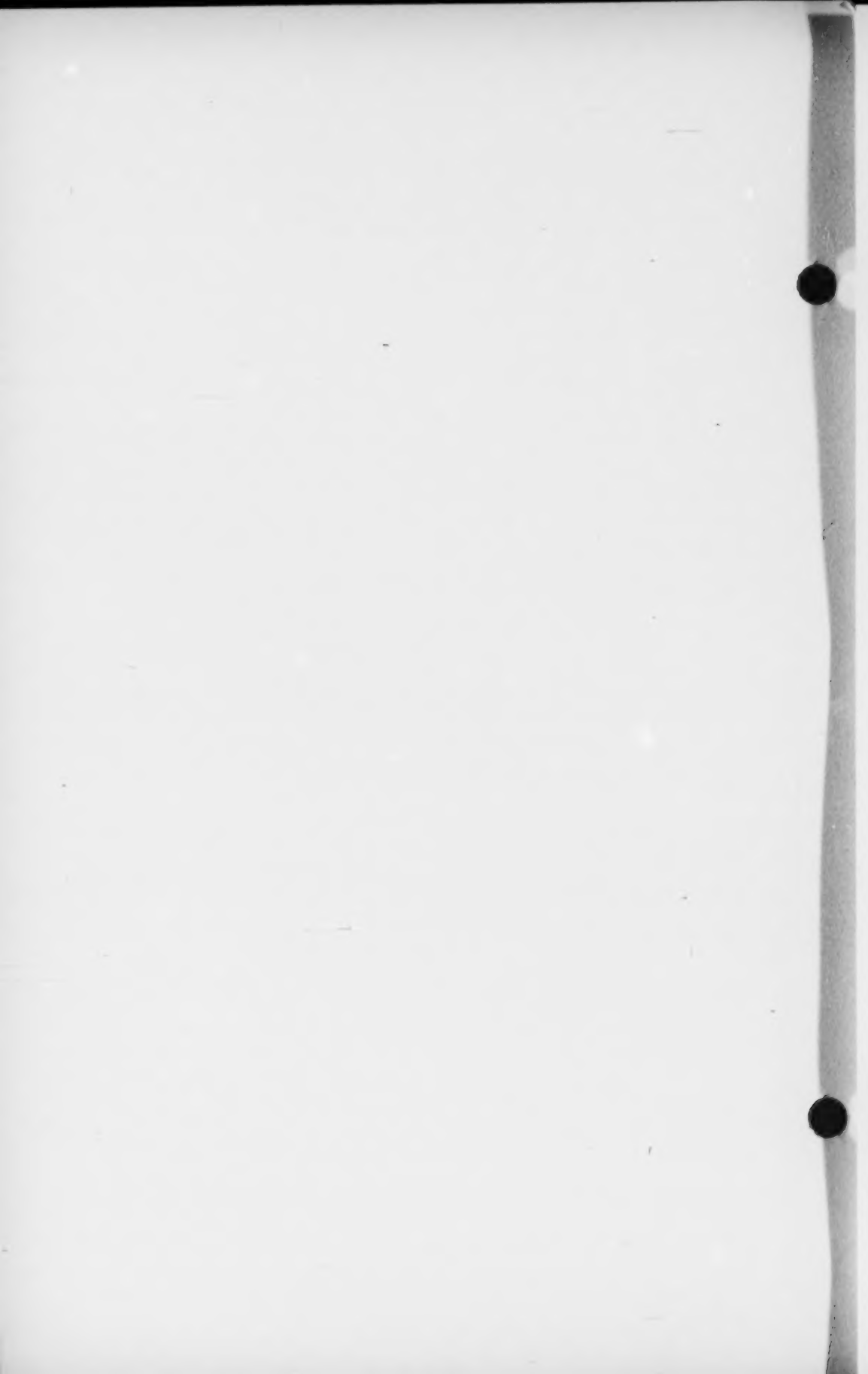


George B. Swick of George Buck  
Consulting Actuaries, Inc.

12. The actuary calculated the estimated contribution to be paid each year to the pension plans and furnished AVCO with an annual actuarial valuation report projecting estimated costs for the ensuing year.

13. The "past service" contribution was calculated through a process of amortizing AVCO's past service liabilities over a period of years.

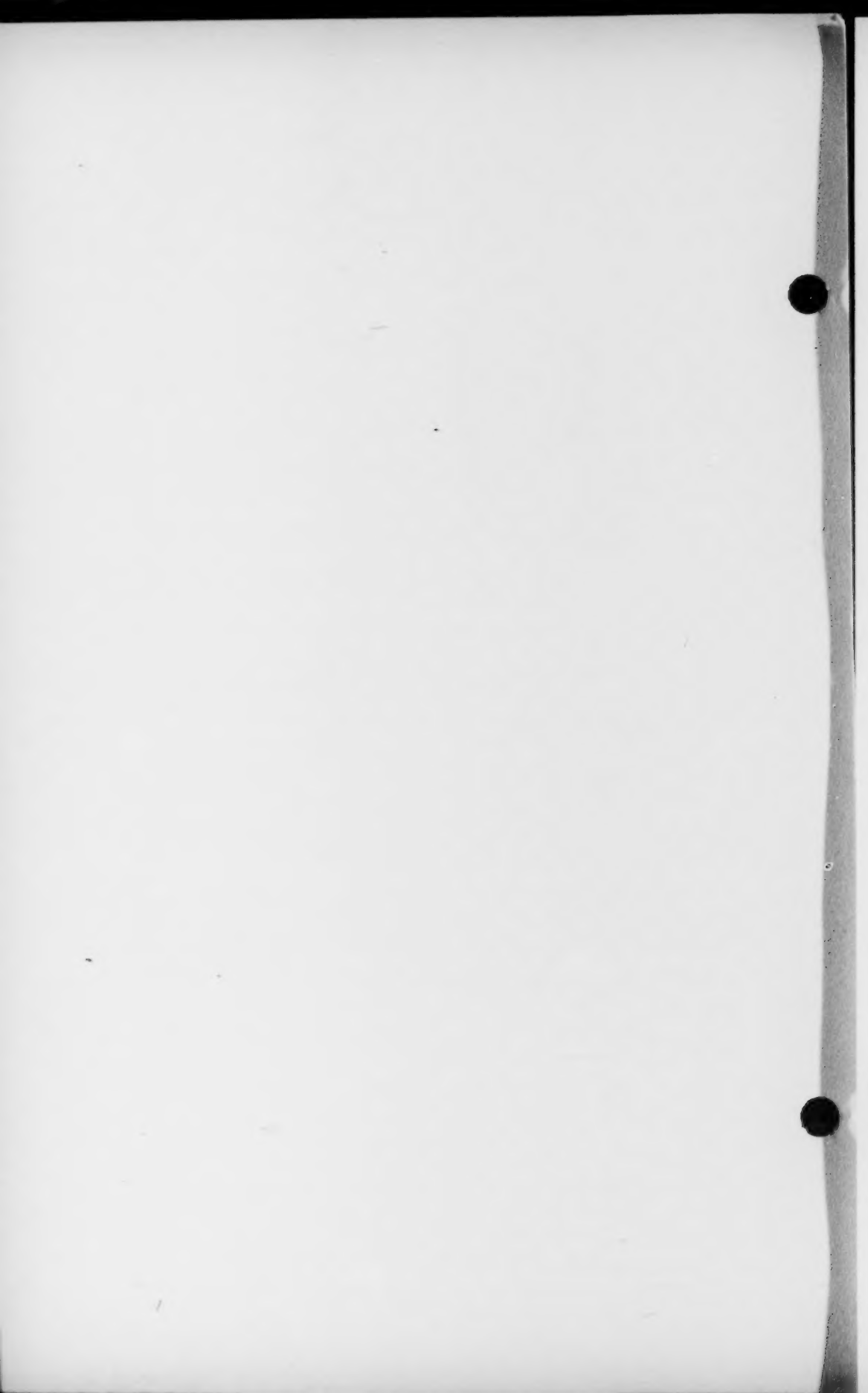
14. In calculating the estimated contribution for "normal" costs, the actuary used the entry age normal cost valuation method. This method was developed by George Swick for use in the second year of the pension plans, 1957, and was used continually thereafter. The entry age normal cost valuation method is a well recognized and commonly accepted method of computing estimated



normal costs for hourly pension plans such as AVCO's pension plans.

15. The entry age normal cost valuation method spreads the estimated cost of normal contributions over the entire period from the average entry age to the average retirement age of employees in the valuation group. Under this method, the attained age of employees on any later valuation date is irrelevant because employees tend to have entered into a working group at the same average age regardless of their attained age on any later valuation date.

16. Under the entry age normal cost valuation method, the actuary made its recommended normal cost computation for a valuation group consisting of all covered employees, i.e., all active employees plus all employees on layoff with recall rights (employees on layoff for less than two consecutive years).



This valuation group was selected on the assumption that all laid off employees would, in fact, be recalled during the ensuing year and accrue pension credit throughout that year for current service, thus creating "normal cost". In each of the annual actuarial valuation reports, the actuary set forth its estimated normal cost in two ways: first, as an annual lump sum contribution calculated on the basis of the normal cost for all of the covered employees, active and laid off and, secondly, as an individual monthly normal cost contribution rate which could be applied to each employee actively accruing credit. Each annual actuarial valuation report contained the following statement: "It is understood that, in lieu of....[the estimated lump sum annual contribution] the corporation will apply the recommended normal



contribution rates to the number of employees actively employed each month".

17. AVCO made its normal cost contributions during the life of the respective Richmond Plans by multiplying the number of employees actively at work each month by the individual normal cost contribution rate. In applying the entry age normal cost contribution method, AVCO made normal cost contributions only for those employees who were currently earning hours of credited service. AVCO still made past service contributions which included amounts attributable to the vested benefits of laid off employees.

18. The inclusion of laid off employees (who are generally younger in age than employees in active service), in the valuation group for calculation of the individual normal cost contribution rate does not improperly lower that

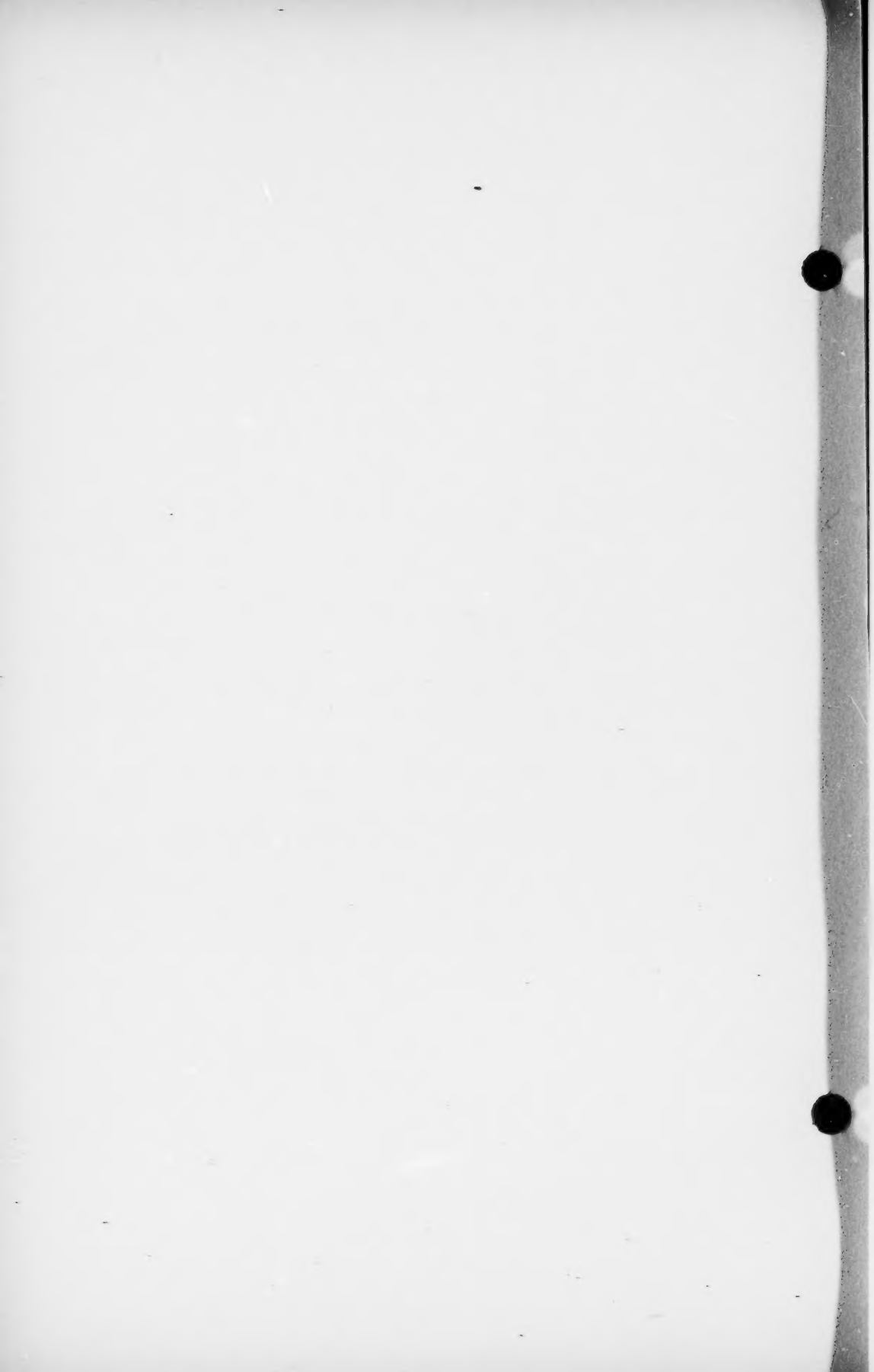


rate applied to active service employees because the attained age of individual employees, noted earlier, is irrelevant under the entry age normal cost method.

C. Termination of the Pension Plans and Segregation of the Assets

19. In late December, 1973, AVCO determined that its Richmond, Indiana plant would have to cease operations. The decision to close the plant was publicly announced on January 2, 1974. No date for the actual closing of the plant was decided until May 1974, when the closing date of August 31, 1974, was set.

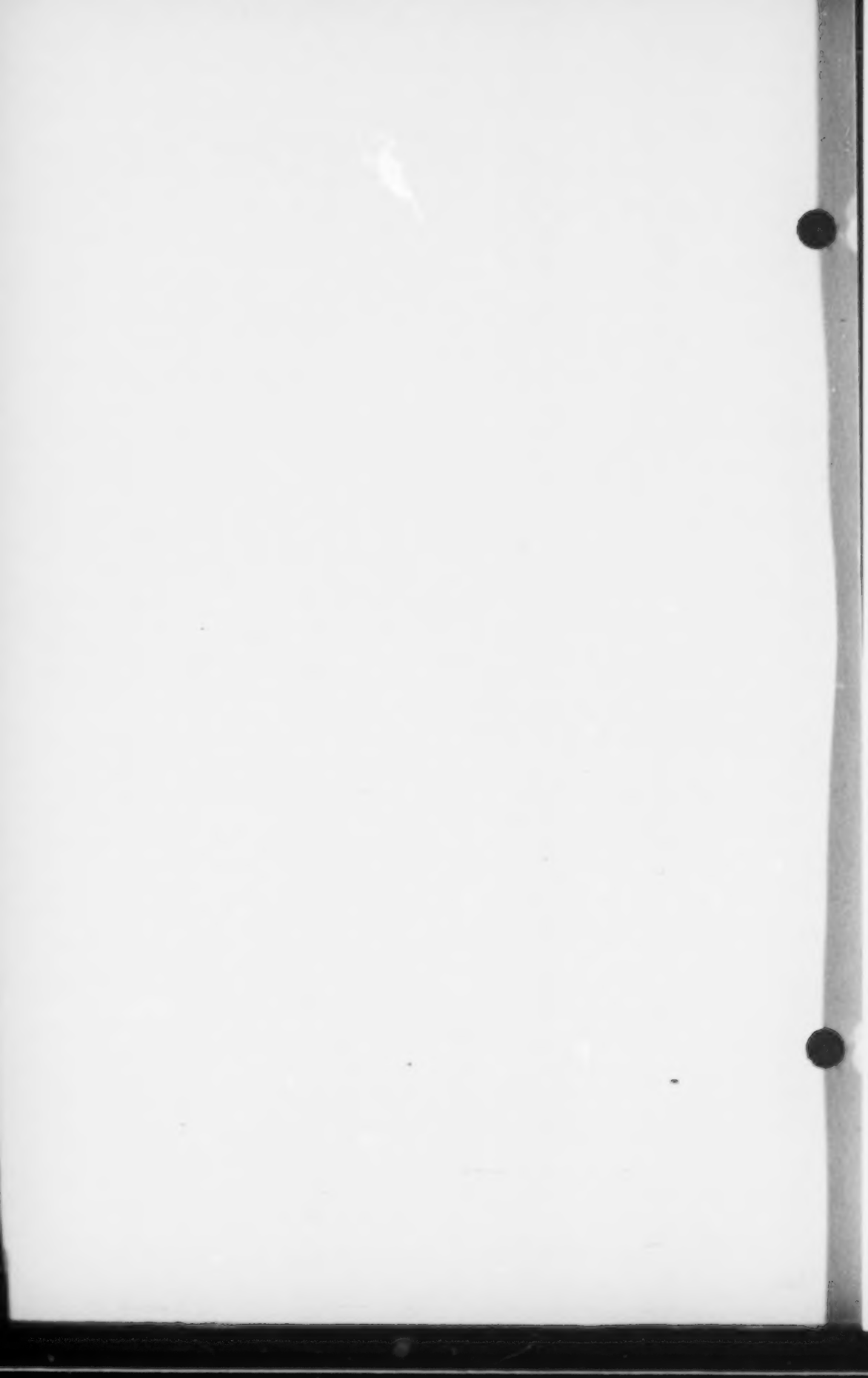
20. Each of the Supplemental Agreements pertaining to the four pension plans contained a provision precluding termination of the underlying plan except upon sixty (60) days written notice to be effective on a date after which the corporation "shall have sold



and transferred title to the manufacturing facilities of the Richmond, Indiana plant or on or after which it shall have permanently discontinued manufacturing operations at the said plant".

21. On May 29, 1974, AVCO sent written notice of the termination of the three pension plans for Local 1127, Local 21, and Local 135 to the respective Unions, to be effective August 31, 1974. Continued security services were required at the Richmond plant after the closing date, thus the pension plan for the Guards Union, Local 200, was not terminated until March 18, 1975, effective May 31, 1975.

22. AVCO notified Chemical Bank of the Richmond plant closing and instructed the bank to segregate the assets allocable to the pension plans for Local 1127, Local 21, and Local 135 on August 23, 1974, effective August 31,



1974. A similar notice was given to Chemical Bank with instructions to segregate the assets of the pension plan for Local 200 on May 1, 1975, effective May 31, 1975.

23. Chemical Bank segregated the assets of the four pension plans upon receipt of the respective notices of termination from AVCO. Chemical Bank then invested the assets in short term investment funds, which were interest bearing investments.

24. The Third Amended Trust Agreement respecting the four pension plans provided in Section 4: The Trustee shall not be liable for the making, retention or sale of any investment authorized hereunder nor for a failure to make, retain or sell any investment; and the Trustee shall not be liable for any loss to or diminishment of the Fund, except such as shall be due



to its own willful misconduct or lack of good faith.

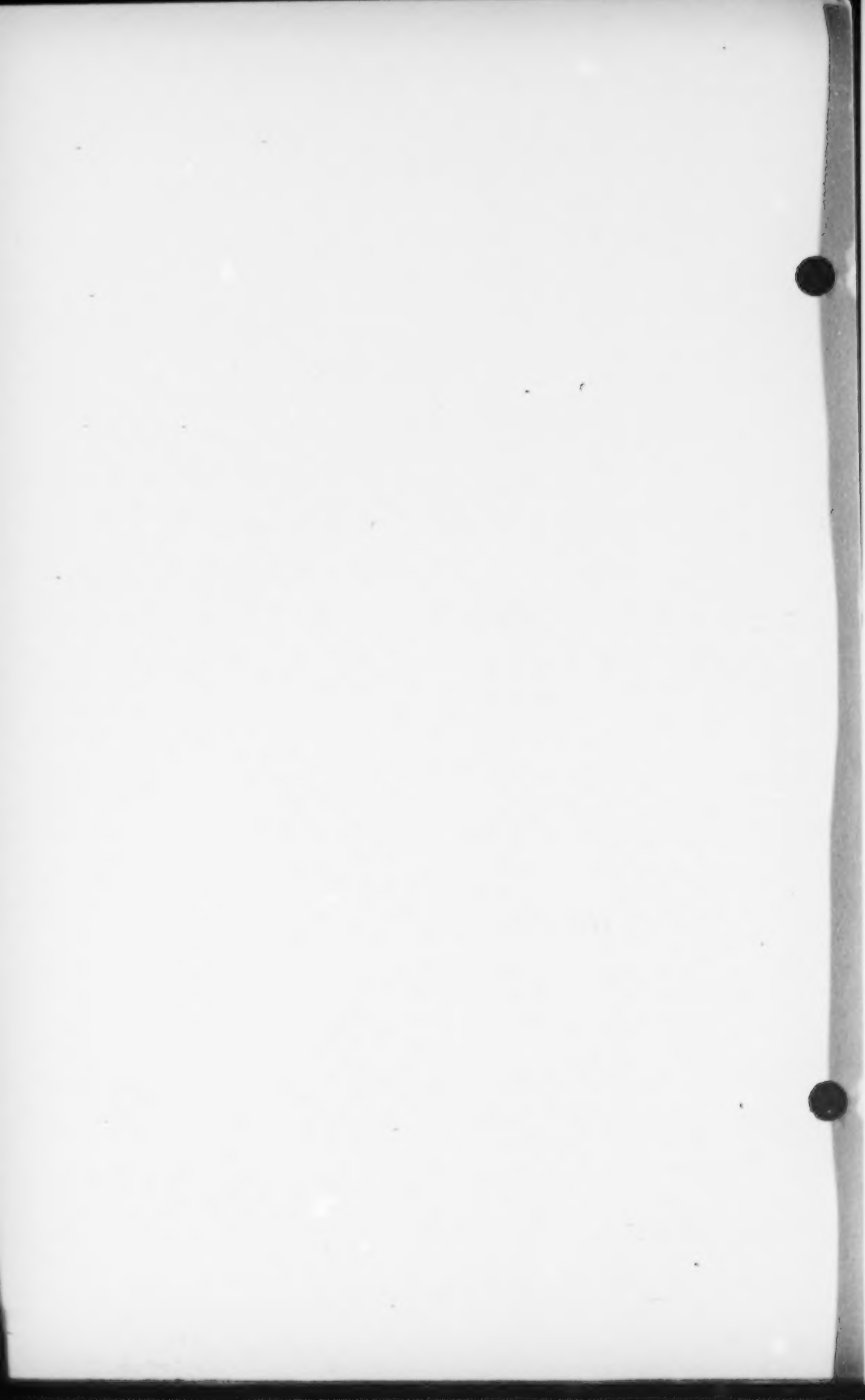
#### CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of the proceeding under the Labor Management Relations Act of 1947, 29 U.S.C. §185.

2. AVCO had an obligation under the Supplemental Agreements to properly fund the pension plans pursuant to the recommendations of the plans' actuary under approved actuarial methods.

3. The contributions made by AVCO to the Chemical Bank, as Trustee, were in full compliance at all times with the recommendations of the Plan actuary.

4. The computation of normal cost made by the Plan actuary was at all



relevant times based upon accepted and sound actuarial methodology.

5. Accordingly, the pension plans in which the plaintiffs participated were properly funded by AVCO.

6. AVCO, as the sponsor of the pension plans, was contractually obligated to make specified actuarially determined contributions to the Chemical Bank, as Trustee, but AVCO had no fiduciary obligations as to how those contributions should be invested. Any rights of plaintiffs in relation to AVCO were and are exclusively contractual. Hurd v. Illinois Bell, 136 F.Supp. 125, 135 (N.D. Ill. 1955), aff'd., 234 F.2d 942 (7th Cir. 1956), cert. denied, 352 U.S. 918 (1956); Gross v. University of Chicago, 14 Ill. App. 3d 326, 302 N.E. 2d 444 (1973); Lehner v. Crane Co., 448 F.Supp. 1127, 1131 (D.C., E.D.Pa., 1978).



7. AVCO had no fiduciary or contractual obligation to notify the Chemical Bank, as Trustee, that the Richmond plant would be closed prior to August 23, 1974 when it conveyed this information to the Bank. Lehner v. Crane Co., 448 F.Supp. 1127, 1131 (D.C., E.D.Pa., 1978).

8. AVCO had no fiduciary or contractual obligation to instruct the Chemical Bank, as Trustee, to segregate the assets allocable to the pension plans at any time prior to the dates when it, in fact, gave such instructions to the Chemical Bank for the plans in issue. Hurd v. Ill. Bell, 136 F.Supp. at 135; Gross v. University of Chicago, 14 Ill. App. 3d at 339, 302 N.E.2d at 454.

9. AVCO had no fiduciary or contractual obligation to direct the Chemical Bank, as Trustee, to liquidate



the assets allocable to the pension plans and reinvest them in interest bearing or short term money market funds at any time and AVCO breached no fiduciary obligation in refraining from such action. Hurd v. Illinois Bell, 136 F.Supp. at 135.

10. Chemical Bank's fiduciary obligation as Trustee of the pension plans did not require it to segregate the assets of the plans prior to notification of the plans' terminations. Chemical Bank in all respects acted reasonably and in good faith when notified by AVCO of the respective plan terminations by segregating the assets and investing in short term interest bearing funds.

11. The law is with the defendants AVCO and Chemical Bank and is against plaintiffs.

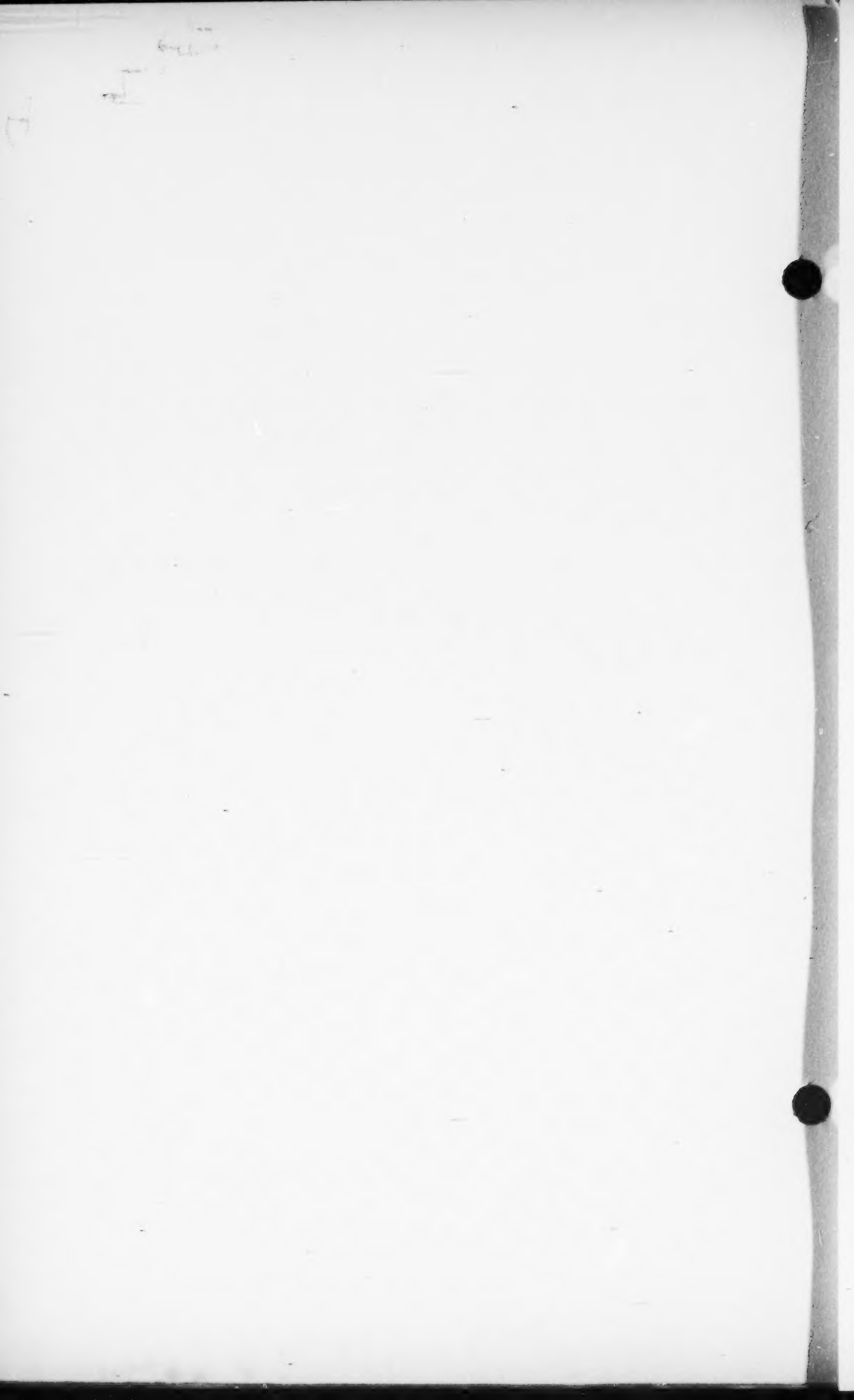


12. To the extent any findings of fact shall have been denominated a conclusion of law, it shall be deemed a finding of fact; to the extent any conclusion of law shall have been denominated a finding of fact, it shall be deemed a conclusion of law.

Accordingly, judgment will be entered in favor defendants AVCO and Chemical Bank. Plaintiffs will take nothing by way of their complaint.

DATED this 28th day of  
December, 1984.

/s/ S. Hugh Dillin  
S. Hugh Dillin, Judge



[Appendix C]

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois 60604

August 5, 1986

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. MYRON L. GORDON, Senior District  
Judge\*

MICHAEL KOLENTUS, et al.,	)
Plaintiffs-Appellants,	)
	)
No. 85-1143	)
VS.	)
	)
AVCO CORPORATION and	)
AVCO PRECISION PRODUCTS DIVISION,	)
AVCO CORPORATION and CHEMICAL BANK,	)
Defendants-Appellees.	)

Appeal from the United States  
District Court for the  
Southern District of Indiana,  
Indianapolis Division.

No. 77-C-689  
S. HUGH DILLIN, Judge.



This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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\* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.



In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

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No. 85-1143

MICHAEL KOLENTUS, et al.,

*Plaintiffs-Appellants,*

*v.*

AVCO CORPORATION and AVCO PRECISION PRODUCTS DIVISION, AVCO CORPORATION, and CHEMICAL BANK,

*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Southern District of Indiana, Indianapolis Division.  
No. IP 77-689-C—S. Hugh Dillin, *District Judge.*

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ARGUED SEPTEMBER 27, 1985—DECIDED AUGUST 5, 1986

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Before BAUER, COFFEY, *Circuit Judges*, and GORDON,  
*District Judge.*\*

GORDON, *District Judge.* The plaintiffs, retirees of Avco Corporation's now-defunct Precision Products Division plant in Richmond, Indiana, brought this class action to recover certain pension benefits which they allege were wrongfully denied them as a result of the termination of four pension plans in 1974 and 1975. The district court granted partial summary judgment for the defendants,

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\* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.



and, following a court trial of the remaining issues, entered judgment for the defendants. We affirm.

## I. BACKGROUND

Prior to August 31, 1974, defendants Avco Corporation and its Precision Products Division (hereinafter collectively referred to as "Avco") operated a factory in Richmond, Indiana, employing approximately 500 persons, which produced home video equipment. On that date, Avco closed the plant, having lost the contract for the products manufactured there and unable to find other work for the plant.

The plaintiff class consists of former Avco workers who were members of four bargaining units at the Richmond plant: Local Union No. 1127 of the International Brotherhood of Electrical Workers (IBEW), Local Union No. 135 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), Local Union No. 21 of the International Association of Tool Craftsmen (IATC), and Local Union No. 200 of the United Plant Guard Workers of America (Guards).

Beginning in 1957, Avco and the four bargaining units entered into a series of collective bargaining agreements, each agreement providing that pension benefits would be governed by supplemental pension agreements. These supplemental pension agreements, following their formation, were themselves amended from time to time. The Pension Plan for Hourly-Rated Employees of Avco Corporation (Hourly Plan), in turn, was incorporated in each of the supplemental pension agreements and constituted the basic pension plan. The Hourly Plan provided for the vesting of benefits upon an employee's fulfillment of certain age and length-of-service requirements.

On August 31, 1974, the day the Richmond plant closed, the IBEW, IATC and Teamsters pension plans were terminated. The pension plan for the Guards was terminated on May 31, 1975. Defendant Chemical Bank (Bank) was the trustee of the pension plans at issue from their inception through the dates of their termination.



Following the plan terminations, Avco made no further contributions to the pension funds. As a result, there were insufficient assets to cover the benefits set out in the pension agreements.

The Pension Benefit Guaranty Corporation (PBGC), under the authority of 29 U.S.C. § 1342 of the Employee Retirement Income Security Act (ERISA), assumed responsibility for and was appointed trustee of the plans upon their termination. The PBGC originally was named a defendant in this action but later was dismissed upon the stipulation of the parties. There is some dispute between the present parties concerning the extent of the PBGC's coverage for plan benefits, the defendants claiming that in many cases retirees have received the same benefits from the PBGC that they would have received had the pension plans been fully funded under the terms of the supplemental agreements. The court need not delve into this dispute. The degree of PBGC coverage relates to the matter of damages and is not relevant to this appeal.

As a result of the plan terminations, the plaintiffs claim that they have been deprived of vested pension benefits to which they are entitled. In support of their claim for these benefits, the plaintiffs charge that (1) any plan provisions purporting to authorize the terminations are invalid and contrary to representations made by Avco to the plaintiffs; (2) Avco should be estopped to deny the vested benefits; (3) Avco has been unjustly enriched; (4) Avco failed to comply with the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §§ 301-309 (repealed and replaced by 29 U.S.C. §§ 1021-1031, effective Jan. 1, 1975), by failing adequately to explain the plan provisions to the plaintiffs; (5) Avco did not make pension contributions in accordance with the standards of the plans' actuary; (6) Avco acted fraudulently in failing to disclose its intention to close the Richmond plant to the union locals when negotiating and entering into the final plan agreements; and (7) Avco violated its fiduciary and contractual duty to the plaintiffs by neglecting to notify the Bank in a timely manner of the projected plant shutdown and plan termi-



nations so that the plan assets could be protected. As to the defendant Bank, the plaintiffs contend that it violated its fiduciary and contractual obligations to the plaintiffs in the management of the pension plan assets.

## II. PREVIOUS LEGAL PROCEEDINGS

The present action originally was filed in Indiana Superior Court on November 10, 1977. Shortly thereafter, the action was removed by Avco to the United States District Court, Southern District of Indiana. Jurisdiction is predicated on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and on 28 U.S.C. § 1332.

On October 11, 1983, in response to the parties' cross-motions for summary judgment, the district court denied the plaintiffs' motion and granted summary judgment to the defendants as to the plaintiffs' claims against Avco for breach of contract, estoppel, unjust enrichment, and fraud. The court held that under the express provisions of the supplemental pension agreements Avco was entitled to terminate the pension plans and cease making further pension fund contributions. The court also ruled that the plaintiffs' fraud claim against Avco was preempted by the National Labor Relations Act (NLRA). The court found, however, that genuine issues of material fact existed as to the plaintiffs' remaining claims.

These claims were tried to the court on July 23 and 24, 1984. On December 28, 1984, the court issued its findings of fact and conclusions of law, ruling in favor of the defendants on the remaining claims and entering judgment accordingly. The court held that Avco had properly funded the plans in compliance with the recommendations of the plans' actuary. The court also concluded that Avco had no fiduciary or contractual obligation to the plaintiffs to give the Bank early notification of the plant closing or to instruct the Bank to segregate the plan assets prior to the time that it did so. Finally, the court determined that the Bank's fiduciary obligation as trustee of the plans did not require it to segregate the plan assets prior to notification of the termination.



Although the present appeal concerns the management and termination of certain employee benefit plans, it is not governed by the provisions of ERISA. In its decision of October 11, 1983, the district court considered whether ERISA preempted the plaintiffs' state law claims. Based on the assumption that the four pension plans at issue all were terminated prior to September 2, 1974, when ERISA was signed into law, the district court concluded that the plaintiffs' state law claims were not preempted. *See* 29 U.S.C. § 1144 (effective January 1, 1975, ERISA preempts state laws relating to employee benefit plans covered by the federal act). While three of the four plans were terminated two days prior to the enactment of ERISA, it is clear from the record that the Guards plan was not terminated until May 31, 1975. The district court incorrectly stated that this latter plan was terminated on May 31, 1974.

The question of the applicability of ERISA to the termination of the Guards pension plan, however, is not raised on appeal. Accordingly, this court will assume without deciding that the plaintiffs' claims as to the termination of this plan are governed by state law.

### III. ISSUES ON APPEAL

Five issues are raised by the plaintiffs' appeal:

- (1) Was Avco entitled to terminate the pension plans and cease making pension contributions?
- (2) Is the plaintiffs' common law fraud claim preempted by the NLRA?
- (3) Did the district court clearly err in finding that Avco made proper cost contributions to the plans in compliance with the recommendations of the plans' actuary?
- (4) Did Avco have a contractual or fiduciary duty to notify the Bank, prior to the time that it did so, of the plant closing and plan terminations and to instruct the Bank to segregate the assets allocable to the plans?



(5) Did the Bank have a contractual or fiduciary duty to segregate plan assets prior to receiving notice from Avco of the plan terminations or to advise Avco to notify it at an early date of the plant closing and plan termination?

The issues on appeal, with the exception of the third one, raise questions of law which this court may independently review. *See S.E.C. v. Suter*, 732 F.2d 1294, 1300 (7th Cir. 1984). The third issue requires the court to review the district court's findings of fact. These findings are reviewed under the clearly erroneous standard of Federal Rule of Civil Procedure 52(a).

#### IV. ANALYSIS

##### A. Avco's Right to Terminate the Pension Plans

The plaintiffs allege that Avco unlawfully deprived them of their vested pension benefits when it terminated the four pension plans in question and ceased making pension fund contributions. They contend that they were never made aware of any limitation on their vested pension benefits and that they bargained for and were reasonably led to believe by Avco that they would receive these benefits in full.

##### 1. Pension Agreement and Summary Booklet Provisions

Section 9(6) of the Teamsters agreement and section 10(6) of the other three agreements contain the following express cancellation clause:

"Anything contained in this Agreement or in the [Hourly] Plan to the contrary notwithstanding, the Corporation may terminate this Agreement as of any date on or after which it shall have sold and transferred title to the manufacturing facilities of the Richmond, Indiana plant or on or after which it shall have permanently discontinued manufacturing operations at the said plant by the service of a written notice



of such termination upon the Union at least sixty (60) days prior to the date on which such termination shall become effective."

It is undisputed that Avco complied with the 60-day notice provision as to each plan terminated.

Each pension agreement also provides that in the event of the plan's termination upon the shutdown of the Richmond plant, Avco "shall cease to be obligated to make any further contributions to the Pension Fund held by the Trustee to cover the cost of benefits attributable to the service of employees employed at the Corporation's plant in Richmond, Indiana . . ." (Teamsters agreement, § 9(8); IBEW, IATC and Guards agreements, § 10(8)). Section 2(3) of each pension agreement states that by the payment of the annual pension contributions, "the Corporation shall be relieved of any further liability and pensions shall be payable only from the Pension Fund."

Thus under the express provisions of the pension agreements, Avco was entitled to terminate the pension plans upon the closing of the Richmond facility and cease making further contributions to the pension fund. Moreover, upon the termination of the plans, the agreements declare that the assets of the fund become the sole source for the future payment of pension benefits.

Confronted with these express provisions of the pension agreements, the plaintiffs point to the description of benefits in the pension plan summary booklets distributed by Avco to the plaintiffs when the plans were adopted. The booklets, entitled "Your Pension Plan," state on page 10 that pension checks shall be received "[a]s long as [the pensioner] live[s] . . ." The booklets do not expressly indicate that pension benefits could be terminated under certain circumstances. A letter from Avco's vice-president prefacing the booklets, however, contains the following qualification:

"[This booklet] covers only the high points of the [Hourly] Plan and is written with as few legal and technical terms as possible. *It is not intended as a*



*substitute for the full text, and should any questions arise, the Agreement Covering Pensions shall govern."*

(Emphasis added).

## 2. Applicable Law

Before addressing the plaintiffs' contentions, it is necessary to clarify what state law is applicable in determining the effect to be given the termination provisions of the pension plans. The district court, without discussion, applied Indiana law to this question. We agree with the plaintiffs that New York law properly governs the question.

The forum state's choice-of-law rules determine what substantive law applies to state law claims. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496-97 (1941). Indiana has long applied what has come to be known as the "most significant relationship" test in deciding what law to apply to a contract dispute. *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (Ind. 1945). This test comes into play, however, only when the parties have not otherwise agreed to the applicable state law. *Utopia Coach Corp. v. Weatherwax*, 379 N.E.2d 518, 522 (Ind. Ct. App. 1978); see also *Jameson Chemical Co., Ltd. v. Love*, 401 N.E.2d 41, 44 (Ind. Ct. App. 1980). An express choice-of-law provision will be given effect in the absence of "exceptional circumstances showing a purpose to commit a fraud on the law." *Paulausky v. Polish Roman Catholic Union of America*, 39 N.E.2d 440, 447 (Ind. 1942); see also 6 I.L.E. Contracts § 2 n.7 (1958).

In the present case, § 12(1) of the Hourly Plan states that its provisions and the provisions of the supplemental pension agreements shall be "construed, regulated and administered" according to New York law. There are no exceptional circumstances in the present case to render the application of New York law fraudulent or unreasonable. Nor have the parties suggested that the State of Indiana has any public policy interest which outweighs the parties' express choice of law. See *Moll v. South Cen-*



*tral Solar Systems, Inc.*, 419 N.E.2d 154, 162 (Ind. Ct. App. 1981). Accordingly, New York law will be applied to the plaintiffs' claims regarding the validity of the termination provisions of the pension plans.

### 3. Validity of Termination Provisions

The plaintiffs assert that because their pension benefits had vested upon their retirement, Avco was barred from ceasing to contribute to the pension fund upon the termination of the pension plans. The defendants concede that the benefits in dispute were vested under the terms of the pension agreements. They contend, however, that the express provisions of the agreements allowing Avco to terminate the agreements without making additional contributions to the pension fund should be given effect.

Under New York law, the employer's obligations under a pension plan are limited to the terms of the plan and are solely contractual in nature. *Schlansky v. United Merchants & Mfrs., Inc.*, 443 F. Supp. 1054, 1059 (S.D.N.Y. 1977); *Gitelson v. DuPont*, 268 N.Y.S.2d 11, 13 (1966). Thus, where "an employee's right to receive payment under the plan is a conditional contract right and when the plaintiff [becomes] a party to the contract by taking employment under it he [is] bound by these conditions." *Gitelson, supra*, 268 N.Y.S.2d at 13. Moreover, where the provisions of a pension plan are clear and unambiguous they will be strictly construed; the court may not rewrite the terms of the plan. *Alt v. Long Island Railroad Company*, 365 N.Y.S.2d 480, 484 (Sup. Ct. 1975), *aff'd*, 387 N.Y.S.2d 610 (App. Div. 1976); *see also Associated Industries, Etc. v. Murray*, 436 N.Y.S.2d 106, 108 (App. Div. 1981). We can find no countervailing policy in New York which overrides these basic principles of contract interpretation.

In the present case, the plaintiffs' right to receive their vested pension benefits was conditioned in clear and unambiguous language on the continued vitality of the pension agreements. Each agreement, by its express terms, permitted Avco to terminate the pension plans upon the



shutdown of the Richmond plant and to cease making contributions to the pension fund. Each agreement also provided that pension benefits would be payable only from the pension fund. We agree with the district court that these clear provisions refute the plaintiffs' claim that they are entitled to their full vested benefits notwithstanding the terms of the pension agreements.

Our conclusion is fully supported by the holding of the Third Circuit Court of Appeals in *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527 (3d Cir. 1970). In *Boase*, the court confronted the same issue we face in the case at bar: whether a termination clause in a pre-ERISA pension plan should be given effect. The pension plan in *Boase* contained a provision allowing the employer to terminate the plan at will. The *Boase* court, applying New York law, held that the termination clause constituted a valid, enforceable contractual condition. The court refused to rewrite the pension plan to contain the provision that the vested benefits of those employees that had completed their employment were unconditionally guaranteed. *Id.* at 532. Similarly, in the present case, we will not rewrite the pension agreements to provide the plaintiffs with an unconditional right to their full, vested pension benefits. We may not alter the express termination provisions in the guise of contract interpretation. *Id.*; *Alt, supra*, 365 N.Y.S.2d at 484.

The simple fact that the plaintiffs' pension benefits had vested does not mean that these benefits are payable in all events or that they are fully-funded. The Supreme Court, in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 378 (1980), recognized that the term "vested" in pre-ERISA parlance means that the employee has satisfied the conditions for eligibility, such as age and length of service, not that the pension plan is fully-funded or that payment of the vested benefits is unconditionally guaranteed. Pension benefits may be vested, in other words, "even if the actual realization of expected benefits might depend on the sufficiency of plan assets." *Id.*



The Court in *Nachman* observed, further, that pre-ERISA pension plans ordinarily contained liability disclaimer provisions similar to those in the Avco pension agreements. *Id.* The Court went so far as to state that because the use of such clauses "unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeatedly expressed intent to encourage the maintenance of pension plans." *Id.* at 385 n.35. One of the major purposes in enacting ERISA was precisely "to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated." *Id.* at 374. If disclaimer provisions were unenforceable upon public policy grounds prior to the enactment of ERISA, the need for the statute's plan termination insurance program would have been largely unnecessary.

The plaintiffs cite several cases in support of the proposition that disclaimers of liability in pension plans cannot limit the payment of vested pension benefits. See *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) (applying Massachusetts law); *Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976) (applying New Jersey law); *Cantor v. Berkshire Life Ins. Co.*, 171 N.E.2d 518 (Ohio 1966). See also *Delaware Trust Co. v. Delaware Trust Co.*, 222 A.2d 320 (Del.Ch. 1966). In *Hoefel*, the court held that the plaintiffs were entitled to full payment of their vested pension benefits despite a termination clause allowing the employer to discontinue the pension plan at any time. The district court in *Hurd* found that the plaintiffs were owed their full vested pension benefits where the pension agreement was amended following the retirement of the plaintiffs to allow the employer to terminate the pension plan. Finally, in *Cantor*, the Ohio Supreme Court held that an employee is due his vested pension benefits notwithstanding a contractual provision giving the employer the right to terminate the pension plan.

None of the cases discussed by the plaintiffs involved the application of New York law; therefore, they do not



control in the present matter. The *Hoefel*, *Hurd*, and *Cantor* cases, furthermore, are factually distinguishable from this case. In none of these cases, unlike the present case, did the agreements at issue contain clear-cut disclaimer provisions stating that the employer's obligation was limited to contributing to the pension fund only during the term of the agreements and that benefits were payable only from the money held in the pension funds. In fact, the court in *Hurd*, *supra*, 419 F. Supp. at 655, expressly recognized that:

"... nothing prevents employers from specifically limiting their liability under a multi-employer plan to the specific contributions to be made by them on a per-hour basis for the life of each collective bargaining agreement, provided that this limitation is the express intention and understanding of the parties."

The Avco pension agreements contained just such limitation provisions bargained for at arm's length by the four collective bargaining units representing the plaintiffs. In *Hurd*, by way of contrast, the termination provision was added to the collectively bargained agreement after the plaintiffs had retired, when they were no longer union members, and thus were unrepresented at the negotiations for the agreement. *Id.* at 645.

We also note that the relevant contractual provisions in both *Cantor* and *Hoefel* allowed the employer to terminate the plaintiffs' pension rights at will. *Hoefel*, *supra*, 581 F.2d at 3; *Cantor*, *supra*, 171 N.E.2d at 337. Under the Avco pension agreements, in contrast, termination was permissible only if Avco sold or shutdown the Richmond facility.

Even if we accept the premise that public policy requires that pension plans be construed, where possible, to avoid the denial of vested benefits, *see Hoefel*, *supra*, 581 F.2d at 6, we cannot ignore the plain termination provisions of the Avco pension agreements. The plaintiffs, through their respective union locals, agreed to these provisions and are now bound by them.



#### 4. Promissory Estoppel

The plaintiffs argue that Avco should be estopped from enforcing the termination provisions of the pension agreements because of the company's statement in the plan summary booklets that pension checks will be received for "as long as [the plan participant] live[s]. . . ." The plaintiffs also contend that each of them relied on documents provided by Avco upon retirement showing the benefits he or she would receive. The summary booklets by their express terms, however, do not purport to set forth the complete provisions of the plans. The booklets warn the employees to consult the pension agreements in the event of any questions concerning benefits.

To sustain a claim for promissory estoppel, the plaintiff must establish (1) a clear and unambiguous promise by the defendant-promisor; (2) which induced reasonable and foreseeable reliance by the plaintiff-promisee; and (3) which resulted in injury to the plaintiff. *Ripple's of Clearview v. LaHavre Associates*, 452 N.Y.S.2d 447, 449 (App. Div. 1982); see also Restatement (Second) of Contracts § 90 (1981). The plaintiffs' asserted reliance on the summary booklets is neither reasonable nor foreseeable in light of the express admonition prefacing each of the booklets. Thus, we conclude that the plaintiffs cannot avail themselves of the doctrine of promissory estoppel.

We agree with the courts in *Anthony v. Ryder Truck Lines, Inc.*, 466 F. Supp. 1287, 1292-94 (E.D. Pa.), *rev'd on other grounds*, 611 F.2d 944 (3d Cir. 1979), and *Churchwell v. Firestone Industrial Products Co.*, 431 N.E.2d 853, 855 (Ind. Ct. App. 1982), that when the summary booklet expressly states that it is merely an outline of the pension plan and that the formal text of the plan governs in the event a question arises, the plaintiffs cannot rely on the general statements of the booklet but must look to the plan itself. See also *Van Orman v. American Ins. Co.*, 680 F.2d 301, 307 (3d Cir. 1982); *Voight v. South Side Laundry & Dry Cleaners, Inc.*, 24 Wis.2d 114, 118 (1964).



The cases the plaintiffs cite in support of their estoppel argument are distinguishable from the present case. In those cases, the booklets failed to inform employees that they were intended only to summarize pension benefits and that the plans themselves were still controlling. *Hoefel, supra*, 581 F.2d at 3; *Hurd, supra*, 419 F. Supp. at 640; *Gould v. Continental Coffee Co.*, 304 F. Supp. 1 (S.D.N.Y. 1969); *Davilla v. Court Employment Project, Inc.*, 383 N.Y.S.2d 140 (Civ. Ct. 1976). Even in *Hurd*, the disclaimer in the summary booklet did not clearly inform the employees that the plan itself was controlling. It simply provided that the summary "is intended to highlight the main provisions of the Plan. For detailed information concerning any specific problem you should contact either the Union or Fund Office." *Hurd, supra*, 419 F. Supp. at 640. Moreover, the court in *Hurd* did not expressly consider the effect of this provision in its discussion of estoppel. *Id.* at 656-57.

The court also notes that in contrast to the case at hand, the employer in *Hoefel, supra*, 581 F.2d at 3-4, when faced with employee expressed concern, actively misrepresented to employees that a change in the structure of the pension plan had strengthened the plan when, in fact, the change was necessitated by the employer's economic losses and did not make the plan more reliable. (Although the court in *Hoefel* based its holding on the plaintiffs' contractual claim and thus found it unnecessary to rule on their promissory estoppel claim, the court did discuss the plaintiffs' reliance on representations made to them by their employer.)

Furthermore, the employer in *Hoefel*, while reserving the right to discontinue the plan, never expressly informed its employees that termination of the plan could cut off payment of vested benefits. *Id.* at 3, 6. The employer, in fact, told its employees just the opposite in the plan summary booklet, informing them that "[n]o change, suspension, or discontinuance [of the pension plan] will adversely affect the pensions already purchased. . . ." *Id.*; see also *Winston v. Trustees of Hotel and Restaurant Em-*



*ployees and Bartenders Int'l Union Welfare Fund*, 441 N.E.2d 1217 (Ill. App. Ct. 1982). The Avco pension agreements, on the other hand, expressly provided that upon plan termination, the company had no further obligation to make contributions to the pension fund, from which pensions solely were payable. Nor did the plan summary booklets distributed by Avco indicate to employees that they would receive their vested benefits even if the respective pension plans were terminated. The Avco booklets simply did not address the issue of plan termination and its impact on pension benefits.

#### 5. Unjust Enrichment and Unconscionability

The plaintiffs next contend that Avco has been unjustly enriched by its failure to pay the plaintiffs their full, vested pension benefits, and that Avco's termination of the plans without fully funding the vested benefits was unconscionable, against public policy and without consideration.

In order to recover for unjust enrichment under New York law, the plaintiff must show that the defendant was enriched at the expense of the plaintiff under circumstances requiring that in equity and good conscience the defendant should make restitution. *Strapex Corp. v. Metaverpa N.V.*, 607 F. Supp. 1047, 1051 (S.D.N.Y. 1985); *Schuler-Haas Electric Corp. v. Wager Constr. Corp.*, 395 N.Y.S.2d 272, 274 (App. Div. 1977). The doctrine of unjust enrichment is recognized at law only in the absence of an agreement between the parties. *Bradkin v. Leverton*, 309 N.Y.S.2d 192, 195 (1970). Thus, enrichment is not unjust where it is permissible under the terms of a pension agreement. See *Craig v. Bemis*, 517 F.2d 677, 684 (5th Cir. 1975).

Here, Avco and the collective bargaining units representing the plaintiffs agreed to the termination provisions in the pension agreements. The agreements provided in plain terms that the company's obligation to make contributions to the pension fund ceased upon the termina-



tion of the respective plans. This case, therefore, is distinguishable from *Lucas v. Seagrave Corp.*, 277 F. Supp. 338, 345-46 (D. Minn. 1967), in which the court held that the plaintiffs' unjust enrichment claim for accrued pension benefits presented a triable issue of fact whether a clause in the pension plan contract providing for the forfeiture of unvested pension benefits when an employee is terminated applies to the contingency of the termination of a large group of employees. Accordingly, the doctrine of unjust enrichment is not applicable to the instant case.

Nor have the plaintiffs made any showing to support a finding of unconscionability. The basic test of unconscionability is whether, in view of the general commercial setting and the circumstances existing at the time of entering into the contract, the clauses at issue are so one-sided as to be oppressive and unfair to the plaintiff. *State v. Avco Financial Service of New York, Inc.*, 429 N.Y.S.2d 181, 185 (1980) (quoting U.C.C. § 2-302, Official Comment 1 (1976)). While the doctrine is intended to prevent oppression and unfair surprise, it is not designed to upset the allocation of risks due to superior bargaining power. *Id.* An unconscionable contract is characterized by the absence of meaningful choice by one of the contracting parties and by contract terms which are unreasonably favorable to the other party. *Id.*

The plaintiffs herein have presented no evidence that their union bargaining representatives were duped into consenting to the termination provisions in the pension agreements or that they had no choice but to accept these provisions. Nor is there any evidence that Avco employed high pressure tactics in negotiating the terms of the pension agreements or that the agreements solely benefited the company. See *Industrialease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 396 N.Y.S.2d 427, 431 n.4 (App. Div. 1977); *Miner v. Walden*, 422 N.Y.S.2d 335, 338 (Sup. Ct. 1979). In sum, there are no facts in the record to support the plaintiffs' claim of unconscionability.



## 6. Welfare and Pension Plans Disclosure Act

The plaintiffs assert that Avco failed to comply with the Welfare and Pension Plans Disclosure Act (WPPDA), 29 U.S.C. §§ 301-309, by not explaining the plan termination provisions to them. The WPPDA was repealed by section 111 of ERISA, 29 U.S.C. § 1301, and replaced by ERISA's stronger disclosure provisions, 29 U.S.C. §§ 1021-1031, effective January 1, 1975. (Section 1031(b)(2), 29 U.S.C., allows the Department of Labor to set an effective date later than January 1, 1975, under certain circumstances.) ERISA's disclosure provisions are not at issue in this case.

The WPPDA required the pension plan administrator to publish a description of the plan for plan participants and beneficiaries and for the Secretary of Labor. 29 U.S.C. § 304(a). Whereas under ERISA's disclosure provisions the plan summary must describe the circumstances which may result in ineligibility for or denial of benefits, 29 U.S.C. § 1022(b), neither the WPPDA nor its regulations contained such a requirement. In approving ERISA's more stringent disclosure requirements, the House Committee on Education and Labor recognized that one of the major changes under the new law is that, unlike the WPPDA, it mandates disclosure of circumstances under which benefits may be terminated. H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648-49 (1974). The WPPDA, thus, did not require Avco to explain in its summary booklets the termination provisions in the pension agreements.

Moreover, even had Avco violated the WPPDA, the statutory enforcement scheme severely limits the remedies available to a plan participant. 29 U.S.C. § 308(b) and (c). Under these provisions, if the plan administrator fails or refuses to supply a copy of the plan description to a participant or beneficiary upon written request, that party may bring a civil action against the administrator and the court, in its discretion, may award \$50.00 per day to the



plaintiff, plus a reasonable attorney's fees, beginning with the date of such failure or refusal. The WPPDA does not authorize a claim for pension benefits, as made by the plaintiff herein. *See Lamb v. Connecticut Gen. Life Ins. Co.*, 509 F. Supp. 560, 564 (D.N.J. 1980), *aff'd*, 643 F.2d 108 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981); *Moyer v. Kirkpatrick*, 265 F. Supp. 348, 350 (E.D. Pa. 1967), *aff'd*, 387 F.2d 955 (3d Cir. 1968). The WPPDA, therefore, does not support the plaintiffs' claim for lost pension benefits.

### B. Preemption of the Fraud Claim

The plaintiffs' complaint charges that at the time of negotiating and entering into the collective bargaining agreements and the pension agreements in effect when the Richmond plant closed, Avco knew that the plant would have to close and acted fraudulently by misrepresenting and failing to disclose facts relevant to the plant closing during the negotiations. The district court held that the plaintiffs' state law fraud claim was preempted by the NLRA.

The fraudulent conduct charged by the plaintiffs constitutes an unfair labor practice under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), which prohibits an employer from refusing to bargain in good faith with the representatives of its employees. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Custom Excavating, Inc.*, 575 F.2d 102, 106 (7th Cir. 1978). A state law claim presumptively is preempted where the unlawful activity charged actually or arguably constitutes an unfair labor practice under the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

Exceptions to the NLRA preemption doctrine are recognized where the activity to be regulated is of only "peripheral concern" under the Act or "touches interests deeply rooted in local feeling and responsibility." *Id.* at 243-44. In determining whether these exceptions apply to a given case, the state's interest in remedying the effects of the challenged conduct must be balanced against both



the interference with the National Labor Relations Board's (NLRB) ability to adjudicate the controversy and the risk that the state will approve conduct that the NLRA prohibits. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983).

The fraudulent conduct alleged by the plaintiffs clearly is of far more than "peripheral concern" under the NLRA. Insuring that employers and employees bargain with each other in good faith is of central importance under the Act. See *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103 (1970); *Truiff Mfg., supra*, 351 U.S. at 153-54.

Nor does the state's interest in redressing the alleged fraud by Avco overcome the general rule of preemption in this case. While the forum state undoubtedly has an interest in protecting its citizens from fraudulent misrepresentations, whether in labor negotiations or not, that interest is outweighed here by the NLRB's strong interest in adjudicating this controversy and the danger that the resolution of the dispute under state law and under the NLRA might differ.

Of critical importance in considering the preemptive effect of the NLRA is whether the controversy presented by the state claim is identical to that which could have been presented to the NLRB. *Belknap, supra*, 463 U.S. at 510; *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978). It is only in this situation that litigation of a state claim necessarily involves a risk of interference with the unfair labor practice jurisdiction of the NLRB. *Id.*

The plaintiffs' common law fraud claim against Avco is indistinguishable from an unfair labor practice claim that could have been pursued before the NLRB. In both cases, the key inquiry would be whether, at the time of negotiating and entering into the final collective bargaining and pension agreements, Avco had knowledge of facts indicating that the Richmond plant would have to close but withheld this information from the plaintiffs' union representatives. One of the local bargaining units, the IATC, actually presented an essentially identical claim of fraud



to the NLRB in May 1984, only to withdraw it less than one month later.

The plaintiffs also suggest that the NLRA preemption doctrine is inapplicable where the state remedy sought is different in kind from the remedy available under the NLRA. Initially, we note that the plaintiffs have made no showing that the damage remedy for lost pension benefits that they seek under their fraud claim is outside the scope of the NLRB's remedial power. Even had they done so, however, their contention still would fail.

In *Garmon, supra*, 359 U.S. at 246-47, the Supreme Court rejected the contention that the rule of preemption is inapplicable simply because the damage remedy available in state court is outside the scope of the NLRB's remedial powers. In reaching its holding, the Court observed that the rule of preemption is designed to prevent "conflict in its broadest sense; conflict with a complex and interrelated scheme of law, remedy, and administration." *Id.* at 243. Therefore, "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" between state and federal regulation. *Id.* at 247.

If there was ever any doubt as to the vitality of the *Garmon* holding, it was laid to rest by the Supreme Court's recent decision in *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1057 (1986). In *Gould*, the Court held that the NLRA preempted a Wisconsin statute which barred certain repeat violators of the federal Act from doing business with the state. Quoting liberally from *Garmon*, the Court in *Gould* stated that "the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 1061.



*Belknap*, contrary to the plaintiffs' contention, does not stand for the opposite. The Court in *Belknap* did not find the preemption rule inapplicable based on a difference between available state and NLRB remedies. Instead, the Court in that case held that the state claim at issue was not preempted under *Garmon* because it presented a different controversy than the claim which could have been brought before the NLRB. *Belknap*, *supra*, 463 U.S. at 510-12. Accordingly, we conclude that the plaintiffs' fraud claim against Avco is preempted by the NLRA.

### C. Adequate Funding of the Pension Plans

The plaintiffs claim that the four pension plans at issue in this case were not adequately funded, and that they were not funded according to the instructions and recommendations of the actuary of the plans. Following the trial of this issue, the court made detailed factual findings and concluded that the plans were properly funded by Avco.

Under the provisions of the pension plans, Avco made so-called "normal contributions" to the pension fund only for active employees: those employees on active service within the given year for which contributions were being made. Thus, Avco had no obligation to make normal contributions to the pension fund on behalf of an employee for any time period during which that employee performed no compensable work. Avco also made "past service contributions" to the pension fund, representing the actuarial value of the projected benefits attributable to prior service accrued before the inception of the given plan as well as payments to cover pension benefit increases for covered employees. The plaintiffs challenge the computation and funding of only the normal contributions, not the past service contributions.

Avco, pursuant to the terms of the pension agreements, made its pension contributions consistent with the recommendations of an independent actuary appointed by the company. During the existence of the four pension plans in dispute, George B. Swick, the appointed actuary, fur-



nished the company with an annual report establishing, *inter alia*, the normal contribution rate to cover the current service to be accrued by employees during the coming year. Avco, in keeping with the methodology used by the actuary, made quarterly normal contributions to the pension fund for each of the four bargaining units by multiplying the monthly normal contribution rate by the number of active employees on the company's payroll, during each month of the quarter.

Avco made pension fund contributions based only on the number of employees then active, even though the normal contribution rate was calculated on the basis of all covered employees: active employees plus those employees, subject to recall, who had been on layoff status less than two years. This discrepancy, according to the plaintiffs, resulted in underfunding of the pension plans based on general actuarial principles and was contrary to the recommendations of the plans' actuary.

The validity of the plaintiffs' underfunding claim turns on the rather limited question of the manner in which the normal contribution rate was calculated. The plaintiffs contend that this calculation was made according to what Mr. Swick termed the attained age method. The plaintiffs' actuarial expert, Daryl Dean, designated this formula as the aggregate method. The important point is not the label assigned to this method but its effect on the calculation of normal contributions. The district court, consistent with the testimony of Mr. Swick, found, however, that the so-called entry age method was used in calculating the normal contributions to the pension fund.

The district court's findings of fact, whether based on oral or documentary evidence, may not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a). This highly deferential standard is particularly important where the findings are based primarily upon the credibility of the witnesses. *Soto v. Dickey*, 744 F.2d 1260, 1263 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1846 (1985). To overturn the lower court's factual findings, we must be left



with the definite and firm conviction, after examining the evidence, that a mistake has been made. *Id.* Our role on review is not to sit as a trier of fact to reweigh the evidence. *Anderson v. City of Bessemer City*, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1504, 1512 (1985).

Under the attained age method, the normal contribution rate is calculated based on the spread from the present age of plan participants, taken in aggregate, at the date of valuation to the assumed time that they will retire or drop out of the given pension plan. Using this methodology, the inclusion of laid-off workers in the calculation of the normal contribution rate would tend to lower the rate. This result flows from the fact that workers laid off are generally younger than those in active service. Therefore, using an attained age calculation, normal contributions would be lower, on average, if laid-off workers were included in the calculation of the rate of contribution than if the valuation group included only active workers.

In contrast to the attained age method, the entry age method is based on the average time from entry in the Avco workforce to retirement for employees in the valuation group. The present value of the projected benefits for each employee included in the valuation group is spread on a level basis over this average time period. According to the undisputed testimony of Mr. Swick, under the entry age method it is immaterial whether the valuation group includes laid-off employees or only active employees because the average time between entry and retirement is not significantly different for these two groups. Mr. Swick testified, without challenge, that laid-off employees were included in the valuation group for calculating the normal contribution rate in order to provide for the unfunded prior service cost to both active and laid-off employees.

The plaintiffs' expert witness, Mr. Dean, considered Avco's normal contributions to be inadequate because the company included laid-off workers in the valuation group for calculating the disputed rate but made normal con-



tributions only for active employees. Mr. Dean specifically conditioned his testimony on his belief that Avco had used the attained age method—what he referred to as the aggregate method—in determining the normal contribution rate.

At the same time, Mr. Dean acknowledged that the entry age method provided an actuarially acceptable means for calculating normal contributions for hourly pension plans such as Avco's plans. Moreover, in his cross-examination Mr. Dean agreed with Mr. Swick that, on an aggregate basis, laid-off and active workers generally will have entered into the employment relationship at the same time.

The district court simply chose to believe Mr. Swick's testimony that he used the entry age method to calculate the normal contribution rate. The district court's finding to this effect is not clearly erroneous.

Each annual report prepared by Mr. Swick contained a section entitled "Valuation Methods." Although no method is actually defined in each of the first eleven annual reports, commencing with the twelfth report and in all successive reports, the valuation method is designated as the "[p]rojected benefit method with aggregate level normal cost and frozen supplemental liability." Mr. Dean interpreted this phrase to mean that the rate was calculated based on the average period of time for employees in the valuation group between their present age at the date of valuation and their age at retirement, what Mr. Swick referred to as the attained age method, rather than the average period of time from an employee's age of entry in the workforce to his or her retirement, the period used under the entry age method.

Mr. Dean did not explain on what basis he made his assumption about the meaning of the contested phrase. Nor did he testify that the phrase had any established meaning in actuarial parlance. In short, the plaintiffs offered no evidence to show that the phrase necessarily is inconsistent with the actuary's contention and the district



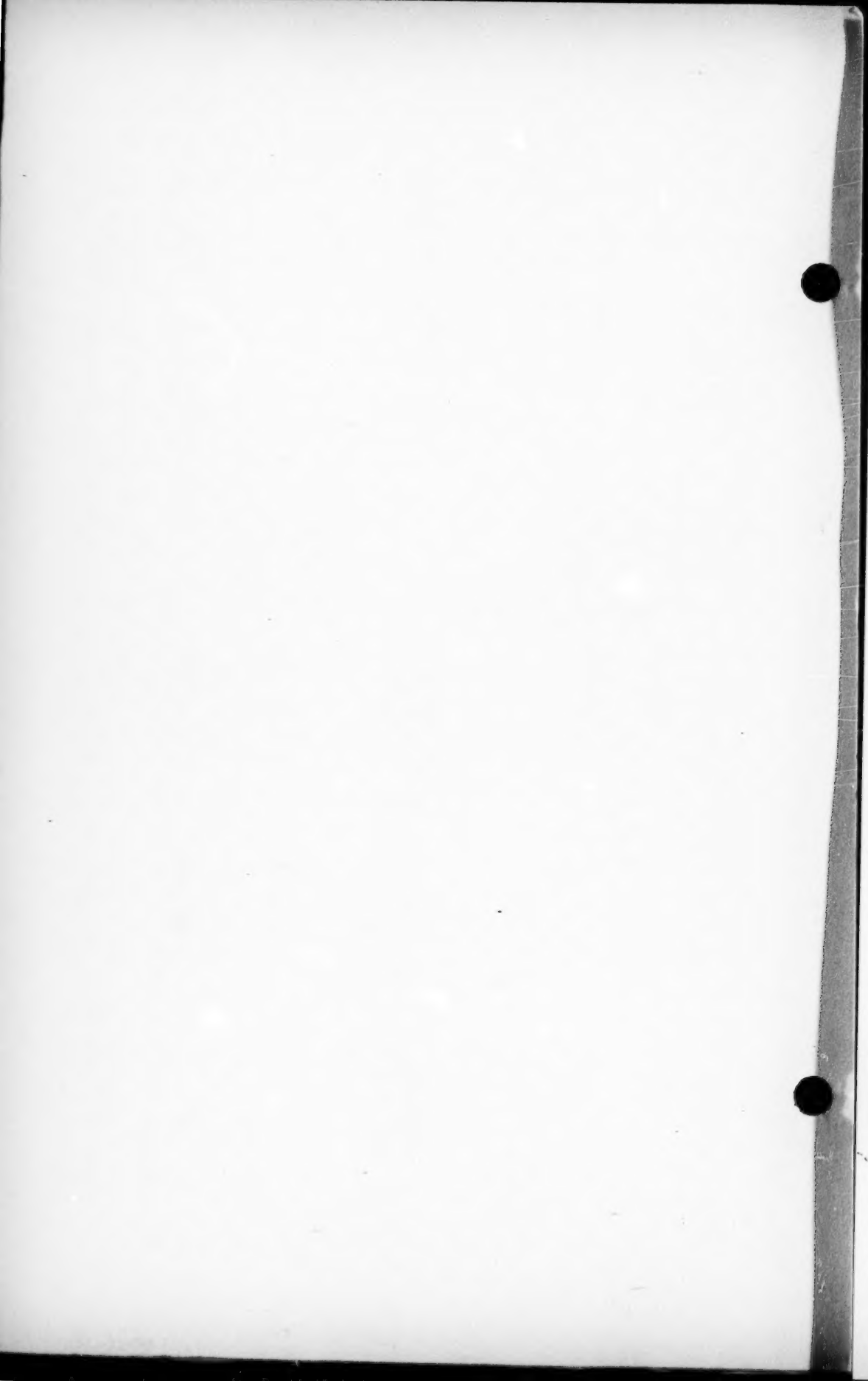
court's finding that the entry age method was used in calculating the normal contribution rate.

Mr. Swick for his part, testified that (1) the term "projected benefits" in the disputed phrase meant simply that the actuary was projecting future benefits; (2) the reference to "aggregate level normal cost" was inserted to indicate that the calculation was not made for individual employees but was made on an aggregate basis for all employees; and (3) the term "frozen supplemental liability" was used to denote that there was a past service obligation. The plaintiffs did not contest this explanation at trial nor have they done so on appeal.

Instead, they suggest that Mr. Swick's testimony is not worthy of credence because his fees were paid by Avco and because he assisted the company in collective bargaining negotiations and in preparing for the termination of the pension plans at issue herein. The assessment of Mr. Swick's credibility is best left to the trial judge who, unlike us, had the opportunity to view the live testimony of the witnesses and consider their demeanor. In *Anderson, supra*, 105 S. Ct. at 1512, the Court said:

"... when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."

The record in this case provides a more than adequate basis for the district court's finding that the plans' actuary used the entry age method in calculating the normal contribution rate. The trial court believed Mr. Swick's explanation that he used the entry age method in calculating the normal contribution. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* Accordingly, we affirm the district court's denial of the plaintiffs' underfunding claim.

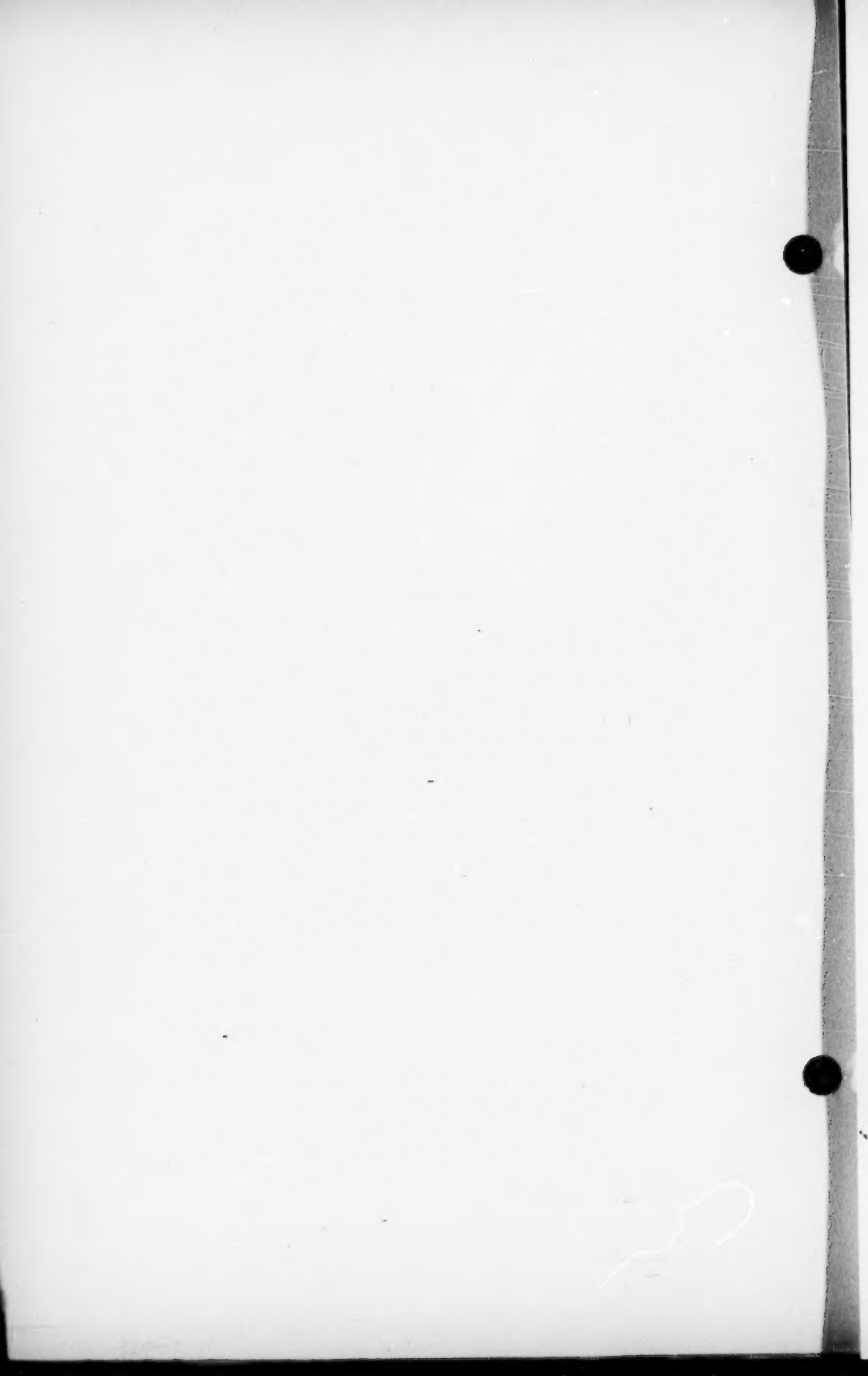


#### D. Avco's Duty to Notify the Bank

The plaintiffs claim that Avco breached its fiduciary and contractual duty to them by failing to notify the Bank not later than January 1974 of the projected Richmond plant closing and the termination of the pension plans in dispute. The plaintiffs theorize that if the Bank had known in January 1974 of the company's plans, as a responsible trustee it would have segregated the plan assets and placed them in low-risk, short-term money market funds to protect them from the exposure and risk of market fluctuations. As it happened, the plan assets declined substantially in value during a falling market in the months immediately preceding the termination of the four plans.

Although in January 1974 Avco publicly announced its decision to close the Richmond plant, the closing date of August 31, 1974, was not set until May 1974. On August 31, 1974, Avco gave the Bank notice of the plant closing along with instructions to segregate the assets allocable to the IATC, Teamsters, and IBEW plans when these plans terminated on August 31, 1974. A similar notice was sent to the Bank on May 1, 1975, with instructions to segregate the assets allocable to the Guards pension plan when it terminated on May 31, 1975. Pursuant to Avco's instructions, the Bank segregated the assets allocable to the four pension plans and invested the assets in short-term, interest-bearing funds. The plaintiffs do not contest these facts, which are detailed in the district court's findings.

The district court concluded Avco's duties to the plaintiffs were exclusively contractual and that the company had no fiduciary duty regarding the Bank's investment of the pension contributions. In addition, the trial court concluded that Avco had no fiduciary or contractual responsibility to notify the Bank of the Richmond plant shut-down or to instruct the Bank to segregate the assets allocable to the four pension plans prior to the time that it did so in August 1974. The plaintiffs challenge these conclusions of law. They are unable, however, to cite any



case law or pension agreement provisions to support their position.

As previously discussed, under New York law an employer's obligations under a pension plan are solely contractual, and, thus, are limited by the terms of the plan. *Schlansky, supra*, 443 F. Supp. at 1059 (and cases cited therein); *see also Lehner v. Crane Co.*, 448 F. Supp. 1127, 1131 (E.D. Pa. 1978); *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125, 135 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir.), *cert. denied*, 352 U.S. 918 (1956).

The plaintiffs cite the statements of Eduardo Aguirre, a bank trust officer who testified on their behalf, that he reasonably would expect the corporate sponsor of a pension plan to notify the trustee of any situation in the company that might affect the pension plan, such as a plant closing or plan termination. This testimony, however, does not support the proposition that Avco was under a contractual duty to notify the Bank as soon as it knew of the Richmond plant closing and plan terminations. Whether it would have been reasonable for Avco to so notify the Bank is not at issue in this case.

The terms of the Avco Hourly Plan vest sole responsibility in the trustee for investment of the pension contributions. There are no plan provisions to imply that it was Avco's duty to notify the Bank as trustee of the plant closing and plan terminations immediately when these facts became known to the company. Section 10 of the Hourly Plan does allow Avco to direct the trustee to segregate assets allocable to a particular class of employees or plan beneficiaries. By its express terms, however, this section is voluntary, not mandatory. We hold, therefore, that Avco did not violate any contractual or fiduciary duty to the plaintiffs by failing to notify the Bank prior to August 23, 1974, of the Richmond plant closing and pension plan terminations.

#### E. The Bank's Management of the Pension Fund

The plaintiffs' final claim is that the Bank violated fiduciary and contractual obligations owed them to segregate



the assets allocable to the four pension plans at an "early date" and to advise Avco to provide it with notice at an "early date" of the Richmond plant closing and the plan terminations. The plaintiffs have not specified what they mean by an "early date," other than to argue that the Bank should have acted "well prior to August 31, 1974." The district court concluded as a matter of law that the Bank's fiduciary obligation as trustee of the pension plans did not require that it segregate the plan assets prior to receiving notification of the plan terminations, and that the Bank acted "reasonably and in good faith" in response to such notification by segregating the pension assets and investing them in short-term funds.

The plaintiffs claim against the Bank is predicated on the application of the prudent investor rule to the Bank's management of the pension fund. This rule, generally applicable in New York, requires the trustee to use such diligence and care in the management of the fund as a person of ordinary prudence would exercise in managing his own affairs. *In re Bank of New York*, 364 N.Y.S.2d 164, 169 (1974); *In re Clark*, 257 N.Y. 132, 137 (1931); N.Y. Est. Powers & Trusts Law § 11-2.2 (McKinney 1967).

Section 4 of the Third Amended Trust Agreement applicable to the four pension plans, however, contained an exculpatory clause relieving the trustee of liability for any loss to or diminishment of the pension fund assets except insofar as such loss was due to "its own willful misconduct or lack of good faith." The Trust Agreement also provided that it be construed and enforced under New York law. The plaintiffs argue that this clause should be held invalid to the extent that it excused the Bank from exercising reasonable care in the management of the pension assets.

Under New York law, exculpatory provisions like the one in the present case are valid in inter vivos trusts. *See Stark v. United States Trust Co. of New York*, 445 F. Supp. 670, 683 (S.D.N.Y. 1978); *In re Cowles' Will*, 255 N.Y.S.2d 160, 174 (App. Div. 1965), *aff'd*, 268 N.Y.S.2d 327 (1966).



To support their position, the plaintiffs cite § 11-1.7, New York Estate Powers & Trust Law, which prohibits exculpatory provisions in testamentary trusts on public policy grounds. By its express terms, this section is only applicable to testamentary trusts. Moreover, the identical predecessor to § 11-1.7 was held inapplicable to inter vivos trusts, as involved in the present case. *In re Sherman's Estate*, 141 N.Y.S.2d 789, 792 (Sur. Ct. 1955); *In re Central Hanover Bank & Trust Co.*, 26 N.Y.S.2d 924, 926-27 (Sup. Ct.), *aff'd*, 32 N.Y.S.2d 128 (App. Div. 1941), *aff'd*, 42 N.E.2d 610 (1942); *see also City Bank Farmers Trust Co. v. Bennett*, 287 N.Y.S. 784 (Sup. Ct. 1936); *Gould v. Gould*, 213 N.Y.S. 286 (Sup. Ct. 1925) (prior to the enactment of the predecessor to § 11-1.7, exculpatory clauses of the type involved in the present case were considered valid). Thus, the exculpatory clause in the Trust Agreement is valid and applicable to this case.

Applying the clause to the claim against the Bank, there is no evidence, nor do the plaintiffs assert, that the Bank's failure to segregate the pension assets and to request notification of the plant shutdown and plan terminations at an "early date" was due to any willful misconduct or bad faith on the part of the Bank. Nor is there any evidence that the Bank knew that the plan terminations were impending prior to receiving notice from Avco or that it otherwise did not act in good faith in managing the pension fund. We find, therefore, that the Bank did not violate its contractual or fiduciary duties to the plaintiffs in the management of the pension fund.

For the foregoing reasons, the judgment of the district court is affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*



[Appendix D]

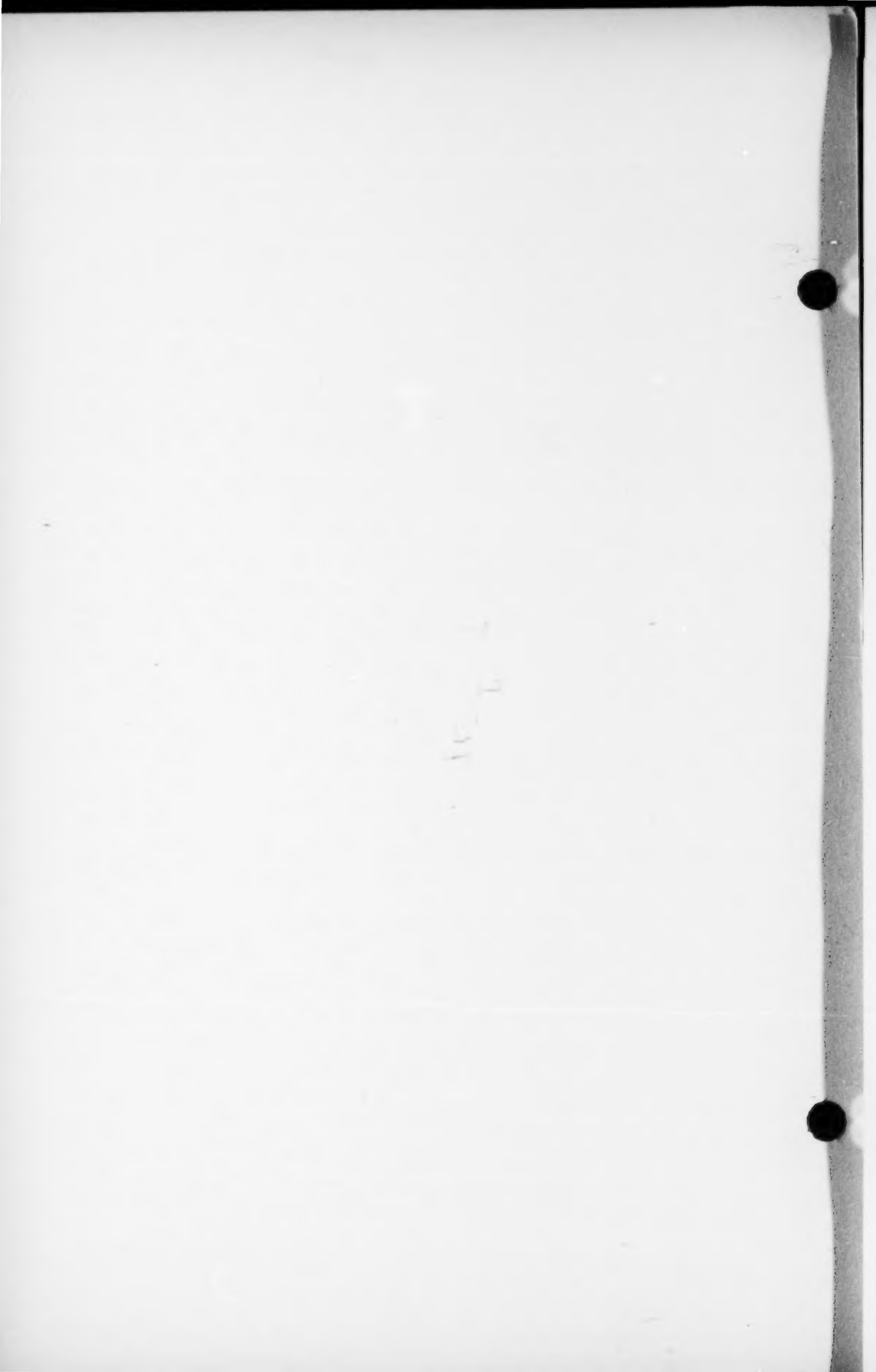
STATUTORY PROVISIONS

29 U.S.C. Secs. 304-305 (Welfare and  
Pension Plans Disclosure Act)

§304. Administrator

Duty to Publish Description of Plan  
and Annual Financial Report.

(a) The administrator of an employee welfare benefit plan or an employee pension benefit plan shall publish in accordance with section 307 of this title to each participant or beneficiary covered thereunder (1) a description of the plan and (2) an annual financial report. Such description and such report shall contain the information required by sections 305 and 306 of this title in such form and detail as the Secretary shall by regulations prescribe and copies thereof shall be executed, published, and filed in accordance



with the provisions of this chapter and the Secretary's regulations thereunder. No regulation shall be issued under the preceding sentence which relieves any administrator of the obligation to include in such description or report any information relative to his plan which is required by section 305 or 306 of this title. Notwithstanding the foregoing, if the Secretary finds, on the record after giving interested persons an opportunity to be heard, that specific information on plans of certain kinds or on any class or classes of benefits described in section 302(1) and (2) of this title which are provided by such plans cannot, in the normal method of operation of such plans, be practicably ascertained or made available for publication in the manner or for the period prescribed in any provision of this chapter, or that the information if

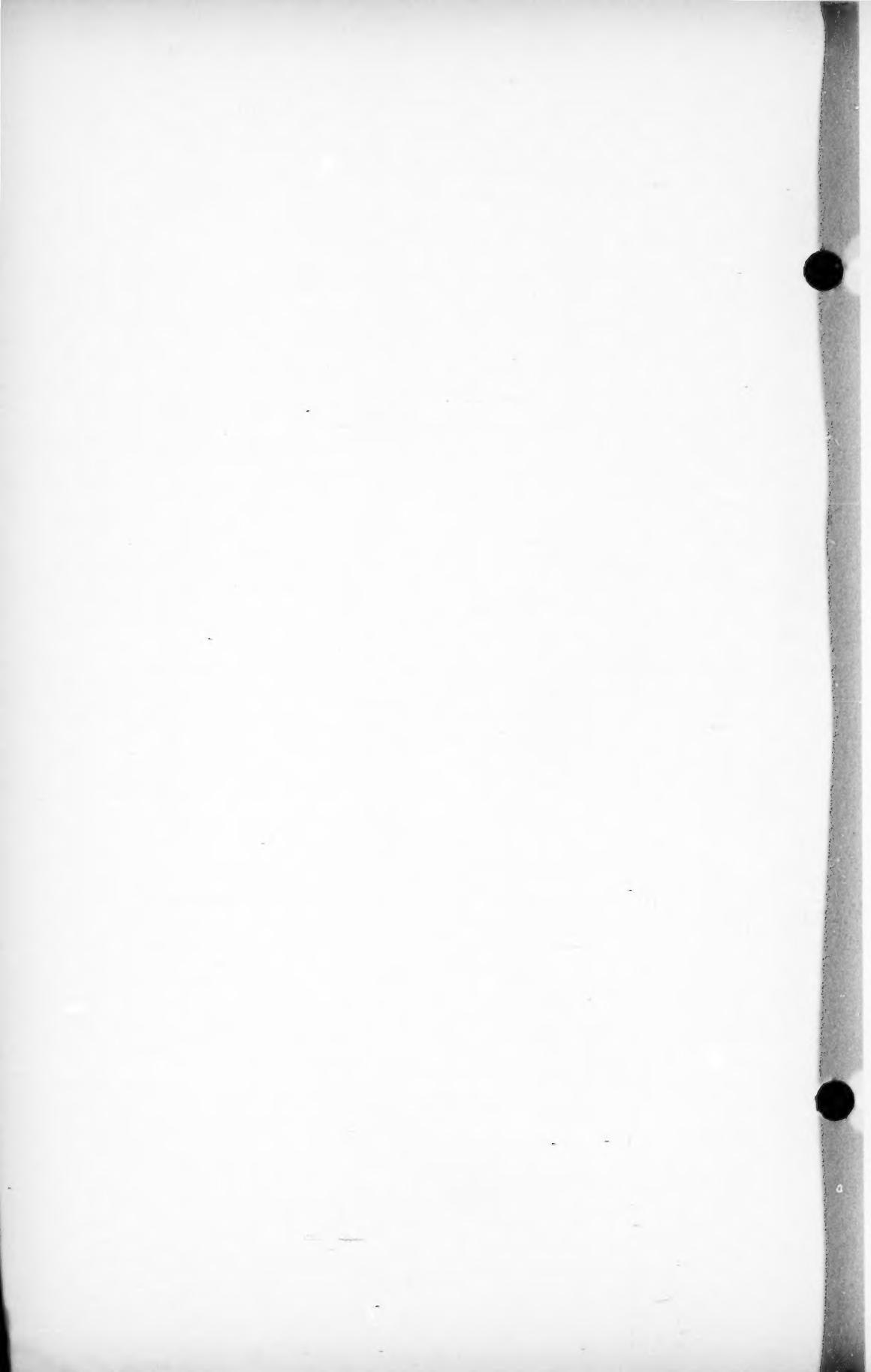


published in such manner or for such period would be duplicative or uninformative, the Secretary may by regulations prescribe such other manner or such other period for the publication of such information as he may determine to be necessary and appropriate to carry out the purposes of this chapter. . . .

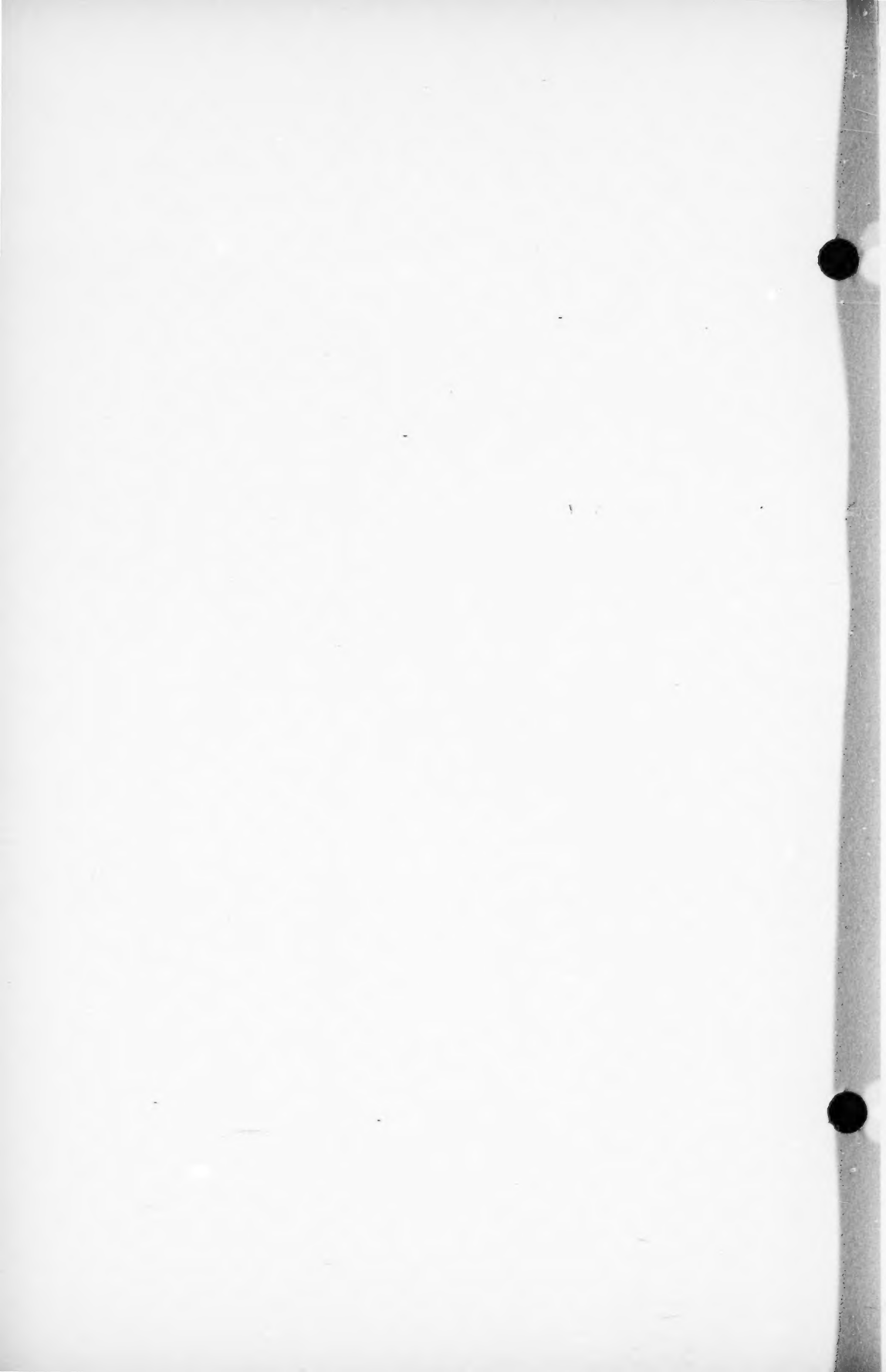
#### \$305. Description of Plan

. . . .

(b) The description of the plan shall be published, signed, and sworn to by the person or persons defined as the "administrator" in section 304 of this title, and shall include their names and addresses, their official positions with respect to the plan, and their relationship, if any, to the employer or to any employee organizations, and any other offices, positions, or employment held by them; the name, address, and



description of the plan and the type of administration; the schedule of benefits; the names, titles, and addresses of any trustee or trustees (if such persons are different from those persons defined as the "administrator"); whether the plan is mentioned in a collective bargaining agreement; copies of the plan or of the bargaining agreement, trust agreement, contract, or other instrument, if any, under which the plan was established and is operated; the source of the financing of the plan and the identity of any organization through which benefits are provided; whether the records of the plan are kept on a calendar year basis, or on a policy or other fiscal year basis, and if on the latter basis, the date of the end of such policy or fiscal year; the procedures to be followed in presenting claims for benefits under the plan and the remedies



available under the plan for the redress of claims which are denied in whole or in part. Amendments to the plan reflecting changes in the data and information included in the original plan, other than data and information also required to be included in annual reports under section 306 of this title, shall be included in the description on and after the effective date of such amendments. Any change in the information required by this subsection shall be reported to the Secretary within sixty days after the change has been effectuated.



N.Y. Est. Powers and Trusts Law, Sec.

11-1.7

§11-1.7 Limitations on Powers and Immunities of Executors and Testamentary Trustees.

(a) The attempted grant to an executor or testamentary trustee, or the successor of either, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence. . . .

(b) The attempted grant in any will of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will invalid as a whole, and the remaining terms of the will shall, so far as possible, remain effective. . . .



29 U.S.C. Sec. 1110 (Employee Retirement  
Income Security Act of 1974)

§1110. Exculpatory Provisions; Insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

. . .